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No. 82-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1981

THE WHITE MOUNTAIN APACHE TRIBE, a body corporate established pursuant to § 16 of the Act of June 18, 1934 (48 Stat. 987; 25 U.S.C. 476) and duly recognized by the Secretary of the Interior,

Petitioner,

v.

WILLIAM FRENCH SMITH,
Attorney General of the United States of America,

and

JAMES G. WATT, Secretary of the
United States Department of the Interior,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

WILLIAM H. VEEDER
Suite 920
818 18th Street, N.W.
Washington, D.C. 20006
(202) 466-3890
Attorney for
White Mountain Apache Tribe
Petitioner

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Whether there should be reviewed by the Court the conflicts between the decisions of the Court of Appeals for the District of Columbia Circuit here for review and the Courts of Appeals for the Ninth and Tenth Circuits respecting the right of Indians to judicial review in water rights litigation of arbitrary and capricious conduct of Respondent Attorney General Smith, acting as a fiduciary, involving an abuse of that officer's litigating discretion, when the arbitrary and capricious conduct involving an abuse of the Attorney General's litigating discretion stems from conflicts of interest which pervade that officer's discretion in Indian water rights litigation.

2. Whether the United States Court and the Court of Appeals erred in declaring that Respondent Attorney General of the United States, acting in a fiduciary capacity, is entitled to absolute immunity from suit in the exercise of alleged litigating discretion, when the Attorney General is charged by Petitioner Tribe with acts in excess of that officer's authority, conflicts of interest and intentional violations of the Tribe's vested property rights constituting bad faith, arbitrary and capricious conduct involving abuses of discretion and causing irreparable and continuing damage to Petitioner Tribe, in a non-monetary action for declaratory judgment and injunctive relief initiated by Petitioner Tribe pursuant to 28 U.S.C. § 1362, arising under the Constitution and laws of the United States; Administrative Procedure Act, 5 U.S.C. §§ 701, *et seq.*, § 702 (1976), § 706; and 28 U.S.C. §§ 2201, *et seq.*

3. Whether the United States District Court and the Court of Appeals erred in declaring that Respondent Secretary of the United States Department of Interior, when acting in a fiduciary capacity, is entitled to absolute immunity from judicial review in the alleged exercise of

non-existent litigating discretion, for whom no claim of immunity was made by Respondents, in an action initiated by Petitioner Tribe charging Respondent Secretary with intentional violations of trust obligations owing to Petitioner Tribe stemming from conflicts of interest, arbitrary and capricious conduct involving abuses of discretion in excess of that officer's authority causing irreparable and continuing damage to Petitioner Tribe through the violation of the Tribe's vested property rights, in a non-monetary action for declaratory and injunctive relief against Respondent Secretary, initiated by Petitioner Tribe pursuant to 28 U.S.C. § 1362, arising under the Constitution and laws of the United States; Administrative Procedure Act, 5 U.S.C. §§ 701, *et seq.*, § 702 (1976), § 706; and 28 U.S.C. §§ 2201, *et seq.*

4. Whether the United States District Court and the Court of Appeals erred in declaring that Respondent Attorney General of the United States and Respondent Secretary of the United States Department of Interior are entitled to absolute immunity from judicial review in the alleged non-existent exercise of litigating discretion when those officers of the Trustee United States are charged with intentional mismanagement, in no sense exercising litigating judgment, of Petitioner Tribe's vested property rights in an action charging those officials with conflicts of interest, arbitrary and capricious conduct involving abuses of discretion in excess of their authority, in a non-monetary action for declaratory and injunctive relief initiated by Petitioner Tribe pursuant to 28 U.S.C. § 1362, arising under the Constitution and laws of the United States; Administrative Procedure Act, 5 U.S.C. §§ 701, *et seq.*, § 702 (1976); § 706; and 28 U.S.C. §§ 2201, *et seq.*

5. Whether there should be reviewed by the Court the decision of the Court of Appeals here for review, which appears to concur with the decisions of the Court of Appeals for the Second Circuit declaring that 5 U.S.C.

§ 702 does not waive the immunity of the United States from suit, which decisions are in conflict with the opinions of the Court of Appeals for the Third Circuit which declare that, in actions of the character here involved seeking non-monetary, declaratory and injunctive relief against federal officials pursuant to congressional enactments granting federal question jurisdiction upon the district courts, the Administrative Procedure Act, 5 U.S.C. § 702 (1976), serves as a waiver of the United States' sovereign immunity.

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STATUTORY PROVISIONS INVOLVED

Administrative Procedure Act

5 U.S.C. § 701. Application; definitions

(a) This chapter applies, according to the provisions thereof, except to the extent that—

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

(b) For the purpose of this chapter—

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2 of title 41; or sections 1622, 1884, 1891-1902, and former section 1641(b)(2), of title 50, appendix; and

(2) "person", "rule", "order", "license", "sanction", "relief", and "agency action" have the meanings given them by section 551 of this title.

5 U.S.C. § 702. Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided*, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

5 U.S.C. § 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

28 U.S.C. § 1362. Indian tribes.

The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, *wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States.* (Emphasis supplied).

Declaratory Judgments Act

28 U.S.C. § 2201. Creation of remedy.

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner White Mountain Apache Tribe respectfully prays that a Writ of Certiorari issue to review the Judgment and Memorandum of the United States Court of Appeals for the District of Columbia Circuit, entered March 16, 1982, a Petition for Rehearing and a Suggestion for Rehearing *En Banc* having been denied, April 8, 1982.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit, not yet reported, appears as Appendix A to this Petition. The order of the United States District Court for the District of Columbia, dismissing Petitioner's Complaint, is not reported. (Appendix C to this Petition).

JURISDICTION

The Judgment and Memorandum Opinion of the United States Court of Appeals for the District of Columbia Circuit was entered March 16, 1982. A timely Petition for Rehearing with Suggestion that Rehearing be *En Banc* was filed March 26, 1982, and was denied April 8, 1982. This Petition for a Writ of Certiorari is filed within ninety (90) days of that date.

The Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

INTRODUCTION

Parties: Petitioner White Mountain Apache Tribe, Fort Apache Indian Reservation, Whiteriver, Arizona, is a duly organized Indian tribe recognized by the Secretary of Interior in accordance with 25 U.S.C. § 476.[1] Petitioner, on May 22, 1981, filed its Complaint for De-

[1] See, Appendix H to this Petition, Complaint, at p. 27a, for Location Map.

claratory Judgment and for Permanent Injunction, not seeking monetary damages, against Respondents William French Smith, Attorney General of the United States, and James G. Watt, Secretary of the United States Department of the Interior. The action was initiated in the United States District Court for the District of Columbia, Civil No. 81-1205.

Jurisdiction: Pursuant to 28 U.S.C. § 1362, Congress provides that an Indian tribe, in the status of Petitioner, may initiate civil actions involving controversies of the nature here involved arising "under the Constitution, laws, or treaties of the United States."[2] There is a genuine, on-going, irreconcilable conflict of great importance between Petitioner Tribe and Respondents Smith and Watt which comes within the purview of 28 U.S.C. §§ 2201, *et seq.*, the Declaratory Judgments Act.

Petitioner Tribe invoked the jurisdiction of the District Court pursuant to the Administrative Procedure Act, 5 U.S.C. §§ 701, *et seq.*; 5 U.S.C. § 702 (1976); 5 U.S.C. § 706; and related sections.[3]

Petitioner Tribe seeks declaratory and injunctive relief, not monetary damages, against the illegal and unauthorized conduct of Respondents, who have violated and threaten to continue to violate Petitioner Tribe's constitutional, civil and vested property rights, which are protected by the Due Process provisions of the Constitution.

Petitioner Tribe's Complaint Summarily Dismissed For Alleged Lack Of Subject Matter Jurisdiction:[4] Respond-

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[2] *Ibid.*, at p. 19a. 28 U.S.C. § 1362. See, in that connection, the recently amended 28 U.S.C. § 1331:

"Federal question

"The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." (1980).

[3] Appendix H to this Petition, Complaint, at pp. 24a and 25a.

[4] Appendix C to this Petition, June 23, 1981 Order dismissing Petitioner Tribe's Complaint, at p. 6a.

ent Attorney General Smith moved to dismiss Petitioner Tribe's Complaint for lack of "jurisdiction over the subject matter of this action."[5] In granting Respondent Smith's Motion to Dismiss, the District Court declared, among other things, that (a) 5 U.S.C. §§ 701, *et seq.*, (b) 28 U.S.C. § 1362, (c) 28 U.S.C. §§ 2201-2202, or (d) any other statute do not confer jurisdiction upon that Court over the Attorney General's exercise of "litigating judgment."[6]

Non-Compliance With Rule 54(b) Of The Federal Rules Of Civil Procedure: Respondent Secretary Watt was not mentioned in Respondent Attorney General Smith's Motion to Dismiss Petitioner Tribe's Complaint. No mention was made of Respondent Secretary Watt in the District Court's Order of Dismissal. Seeking compliance with Federal Rule 54(b), Petitioner Tribe requested an amendment in the Order of Dismissal to include the last-mentioned Respondent.[7] In dismissing only Respondent Attorney General, there remains undisposed of, as reviewed below, the numerous claims asserted by Petitioner Tribe against Respondent Secretary Watt.[8]

Allegations In Petitioner Tribe's Complaint To Be Taken As True: Respecting an order dismissing a complaint against the Attorney General, the Court said this:

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[5] Appendix G to this Petition, at p. 18a, Motion to Dismiss Complaint—only as to Respondent Attorney General, Respondent Secretary of Interior was not included in the Motion.

[6] Appendix C to this Petition, at p. 6a.

[7] Rule 54(b) of the Federal Rules of Civil Procedure requires that, when more than one claim for relief is presented in an action and when multiple parties are involved, the district court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties. That disposition of the matter, however, is limited to situations where the court makes an express determination that there is no just reason for delay and upon express direction for the entry of judgment.

[8] See, Appendices D and E to this Petition at pp. 7a and 8a.

> . . . *if the allegations of the complaints are taken as true* (as they must be on the motions to dismiss), the Executive Order does not authorize the Attorney General [to perform the activities about which Petitioner complains] . . .[9]

In *Scheuer v. Rhodes*,[10] where, as here, a complaint was summarily dismissed by the District Court, the Court declared that the facts, as alleged, must be taken as true. The task of the District Court, under those circumstances, is "necessarily a limited one." [11] The Court then emphasized that a complaint must be construed favorably for the pleader.[12] Those concepts have been applied repeatedly.[13] Moreover, "summary disposition" is disfavored.[14]

A. Bad Faith And Arbitrary And Capricious Conduct, Involving Abuses Of Discretion By Respondents, Stem From Conflicts Of Interest And Preclude Respondents From Proper Performance Of Their Legal Obligations Owing To Petitioner Tribe

Petitioner Tribe asserts that the sovereign immunity of the United States has been waived by 5 U.S.C. §§ 702, *et seq.*, and that it is entitled to declaratory relief pur-

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[9] Joint Anti-Facist Refugee Committee v. McGrath, Attorney General, *et al.*, 341 U.S. 123, 126 (1951). (Original emphasis).

[10] 416 U.S. 232, 236 (1974).

[11] *Ibid.*

[12] *Ibid.*, at p. 238.

[13] Garrett v. Bamford, 538 F.2d 63, 65 (CA 3, 1976), *cert. den.*, 429 U.S. 977 (1976), citing Walker, Inc. v. Food Machinery, 381 U.S. 172, 174-75, 86 S.Ct. 347, 15 L.Ed.2d 247 (1965); Curtis v. Everette, 489 F.2d 516, 518 (3d Cir. 1973), *cert. den. sub. nom.*; Smith v. Curtis, 416 U.S. 995, 94 S.Ct. 2409, 40 L.Ed.2d 774 (1974). See, also, Bell v. Hood, 327 U.S. 678, 682 (1946).

See, 5 *Federal Practice and Procedure*, Wright, Miller & Kane, § 1350, pp. 551-52, and cited authorities; see, Pocket Part during 1981, at p. 112.

[14] Johnsrud v. Carter, 620 F.2d 29, 32 (CA 3, 1980).

suant to 28 U.S.C. §§ 2201, *et seq.*, against both Respondents. Respondents admit to (a) their arbitrary and capricious conduct as it pertains to the administration of Petitioner's Salt River rights, resulting in irreparable and continuing damage to Petitioner Tribe; and (b) Respondent Attorney General Smith's arbitrary and capricious conduct as it pertains to the preparation and prosecution of litigation involving Petitioner Tribe's Salt River rights, resulting in irreparable and continuing damage to Petitioner Tribe and to the Tribe's Salt River rights.[15]

1. ***Specifically, In Its Complaint Seeking Declaratory And Injunctive Relief Against Administrative Violation Of Petitioner's Salt River Rights By Respondents, Petitioner Alleged The Following***

(a) *Subject Matter or Res*

Petitioner Tribe holds full equitable title [16] to Salt River rights sufficient to meet the Tribe's present and future water requirements on the Fort Apache Indian Reservation.[17] Judicial cognizance by the Court in *Winters v. United States* [18] was taken that, in the arid and semi-arid

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[15] See, p. 3, *supra*, "Allegations In Petitioner Tribe's Complaint To Be Taken As True."

[16] See, Appendix H to this Petition, Complaint, at p. 26a, para. I.

[17] The White Mountain Apache Indian Reservation was created by Executive Order issued November 9, 1871, 2 Kappler, 2nd ed., at pp. 810, *et seq.* As stated in White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 138, note 1 (1980), the Congress, by Act of June 7, 1897 (30 Stat. 64), divided the White Mountain Apache Indian Reservation into the Fort Apache Indian Reservation and the San Carlos Indian Reservation.

Congress has recognized title in the White Mountain Apache Tribe in In Re Wilson, 140 U.S. 575, 577 (1892). Title likewise resides in Petitioner Tribe to resources that are part of the Fort Apache Indian Reservation. 29 Op. A.G. 239, 241, *et seq.* (1911), citing In Re Wilson.

[18] 207 U.S. 564, 576 (1908).

West, Indian lands without water are "valueless." In *Arizona v. California*, the *Winters Doctrine* was applied to Indian reservations in Arizona.[19] The Court imputed knowledge to both the Congress and the Executive Branch of the Government that water was "essential" for the Indian people on the arid reservations to meet their present and future water requirements. Those *Winters* rights are measured by the practicably irrigable acreage within the reservation.[20]

(b) *Respondent Agents for Trustee United States*

Respondents admit that they are principal agents of the United States, trustee for the Tribe[21] and are charged with the most "exacting fiduciary standards" in the performance of their responsibilities owing to Petitioner Tribe.[22] Respondents must exercise the highest degree of care, skill and diligence in the performance of those functions and, moreover, must act solely for the benefit of Petitioner Tribe.[23]

(c) *Respondents' Intentional Mismanagement of Tribe's Salt River Rights*

Irreconcilable conflicts of interest pervade all aspects of Respondents' conduct respecting Petitioner Tribe's Salt River rights. Respondents have in the past and are now seeking to diminish, limit, denigrate and violate the Tribe's Salt River rights for the benefit of the Salt River Federal Reclamation Project and the Central Arizona Federal Reclamation Project administered by Respondent

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[19] 373 U.S. 546, 599-601 (1963).

[20] See, Appendix H to this Petition, Complaint, at p. 27a for Location Map.

[21] Cherokee Nation v. Georgia, 30 U.S. 1, 15 (1831).

[22] Seminole Nation v. United States, 316 U.S. 286, 297 (1893).

[23] See, Appendix H to this Petition, Complaint, at pp. 39a and 40a, paras. XIX and XX.

Secretary Watt.[24] Due to their conflicts of interest, Respondents seek to subvert Petitioner Tribe's Salt River rights to the *Kent Decree* in the Maricopa County Court, State of Arizona. They admit that their predecessors procured the entry of the *Kent Decree* for the benefit of the Salt River Federal Reclamation Project. The *Kent Decree* involves an intentional violation of Indian rights to the use of water by Respondents. The Tribe alleged and is prepared to prove that Respondents Watt and Smith, in a clear abuse of their discretionary powers, as principal agents of the Trustee United States, through arbitrary and capricious conduct, plan to violate Petitioner Tribe's *Winters* rights for the benefit of Salt River Federal Reclamation project. That arbitrary and capricious conduct is a product of Respondents' irreconcilable conflicts of interest.[25]

Respondents' efforts to subvert Petitioner Tribe's rights to the *Kent Decree* and other state court decrees stem from the preference that those officials accord to the federal reclamation projects.[26]

Planned violations by Respondents of the Tribe's Salt River rights stem entirely from intentional mismanagement and in no way pertain to the "litigating judgment" of the Attorney General.

2. *Relief Prayed For By Petitioner Tribe Against Respondents*

Petitioner Tribe seeks declaratory judgment against Respondents establishing as a matter of law that, by rea-

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[24] *Ibid.*, at p. 39a, "Agents Of Trustee Violate Their Obligations To The Tribe"; see, paras. XVIII, *et seq.*; p. 40a, "All Pervasive Conflicts of Interest. . . ."

[25] *Ibid.*

[26] *Ibid.*, at p. 42a, "A Corrupt History: The Salt River Federal Reclamation Project," paras. XXVII, *et seq.*; "Conflicts Of Interest Of The Attorney General—Conclusively Established By Kent Decree," at p. 48a, paras. XXXVI, *et seq.*

son of their conflicts of interest, Respondents cannot properly fulfill their responsibilities as principal agents of the United States, trustee for the Tribe. Respondents will cause irreparable and continuing damage to Petitioner Tribe by the seizure, diminution and violation of the Tribe's Salt River rights, if Petitioner is denied the judicial review that it seeks.[27]

Additionally, Petitioner Tribe seeks relief enjoining both Respondents from taking action which would submit Petitioner Tribe's Salt River rights to the laws of Arizona or to the courts of that State.

Totally ignored by the District Court and the Court of Appeals is the fact that relief was sought by Petitioner Tribe respecting the intentional mismanagement of the Tribe's rights.

B. Declaratory And Injunctive Relief Sought By Petitioner To Preclude Respondent Attorney General From Exercising Arbitrary And Capricious "Litigating Judgment"

It is admitted by Respondent Attorney General Smith [28] that conflicts of interest pervade all aspects of that official's activities involving "litigating judgment" in connection with Petitioner's Salt River rights. Petitioner Tribe repeatedly advised that officer that his conflicts of interest resulted in the Tribe's rejection of any representation by Respondent Attorney General Smith involving the Tribe's Salt River rights.[29]

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[27] *Ibid.*; see, Petitioner Tribe's Prayer for Relief involving administrative violations in no way pertaining to the Attorney General's exercise of "litigating judgment," at p. 62a, paras. 1 & 2.

[28] See, p. 3, *supra*, "Allegations In Petitioner Tribe's Complaint To Be Taken As True."

[29] See, Appendix H to this Petition, Complaint, at p. 26a, para. 1; see, Tribal Resolution; Correspondence between Petitioner Tribe and Attorney General and Solicitor of the Department of Interior, at pp. 36a-38a, note 2, and appendices attached to Appendix H.

Pleaded by Petitioner Tribe and admitted by Respondents is that the agency, which operates the Salt River Project, initiated litigation against Petitioner Tribe.[30] Seeking to defend its Salt River rights against seizure and the subversion of its rights to the *Kent Decree*,[31] Petitioner Tribe removed the proceedings to the federal court and moved to dismiss. Respondents did not join Petitioner in its efforts to protect the Tribe's Salt River rights.[32] The Tribe's motion to dismiss was denied.[33]

The Ninth Circuit reversed the District Court declaring that the state court lacked jurisdiction over Indian water rights by reason of the disclaimer in Arizona's Enabling Act.[34] Hence, it was error to deny Petitioner's Motion to Dismiss the action by Respondent Watt's agent against the Tribe.

There are pending here Petitions to review the opinions of the Ninth Circuit that Indian rights are not subject to the jurisdiction of Arizona state courts by reason of Arizona's Enabling Act.[35]

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[30] *Ibid.*, at p. 59a, para. LVII.

[31] See, p. 7, *supra*.

[32] In re Matter of Determination of Conflicting Rights, 484 F.Supp. 778, 784 (U.S.D.C. D. Ariz. 1980).

[33] *Ibid.* There, the federal district court declared that the proceeding was a "general adjudication" upon grounds subsequently rejected by the Court of Appeals, see, note 34, *infra*. See, Dugan v. Rank, 372 U.S. 609, 618 (1963). See, also, Appendix H to this Petition, at p. 54a, paras. L, *et seq*.

[34] San Carlos Apache Tribe v. Arizona, *et al.*, 669 F.2d 1093 (CA 9, 1982); Northern Cheyenne Tribe v. Adsit, *et al.*, 668 F.2d 1080 (CA 9, 1982). Respecting Arizona's Enabling Act, see, McClanahan v. Arizona State Tax Comm'n., 411 U.S. 164, 175 (1973).

[35] Arizona, *et al.*, Petitioners v. San Carlos Apache Tribe, Respondents, No. 81-2147, filed May 12, 1982, United States Supreme Court, October Term, 1981; State of Montana, *et al.*, Petitioners v. Northern Cheyenne Tribe, Respondents, No. 81-2188, filed May 21, 1982, United States Supreme Court, October Term, 1981.

Irrespective of the Ninth Circuit's decisions in the *San Carlos* and *Northern Cheyenne* cases, there is an ongoing controversy between Petitioner Tribe and Respondents. Respondents assert that, notwithstanding their bad faith and the arbitrary and capricious conduct, they have the power over Petitioner's objections to make decisions for the purposes of litigation respecting the Tribe's vested rights. Reference in that connection is made to the recent assertion by Respondent Secretary Watt to the Solicitor that, irrespective of the Court of Appeals' decisions in *Northern Cheyenne* and *San Carlos*, Petitioner Tribe's Salt River rights would be adjudicated.[36]

1. *Relief Prayed For By Petitioner Tribe*

Petitioner Tribe seeks a *declaratory judgment* that conflicts of interest, giving rise to an abuse of discretion by the Attorney General, preclude that officer from exercising "litigating judgment."

Additionally, the Tribe seeks injunctive relief that will prohibit Respondent Attorney General from exercising "litigating judgment" in regard to the Tribe's Salt River rights.[37]

As will be reviewed, the "litigating judgment" of Respondent Attorney General Smith was illegally projected to Respondent Secretary Watt irrespective of the fact that the Secretary of Interior has no power whatever to exercise "litigating judgment" under the circumstances.

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[36] See, Appendix I to this Petition, at p. 154a, May 19, 1982 letter from the Office of the Solicitor, Department of Interior, on behalf of Respondent Secretary Watt, advising Petitioner Tribe that the Secretary was demanding data assembled by the Tribe for use in purposes of litigation. It is denied by Petitioner Tribe that Respondent Secretary Watt, in view of the conflicts of interest, may properly make such demands. The data requested by Secretary Watt would be used against the Tribe for the benefit of the federal reclamation projects.

[37] See, pp. 8, *et seq.*, *supra*.

C. Court Of Appeals Affirmed District Court's Order Of Dismissal Ignoring Admissions By Respondents Of Their Conflicts Of Interest And Arbitrary And Capricious Intentional Mismanagement Of Petitioner Tribe's Salt River Rights [38]

The Court of Appeals affirmed the order of the trial court dismissing Petitioner Tribe's Complaint. Ignored by the Court of Appeals is the fact that Petitioner Tribe sought relief against both Respondent Attorney General Smith and Respondent Secretary of Interior Watt.

By its opinion, the Court of Appeals, in plain and serious error, attempted *sua sponte* to amend and reconstruct Petitioner Tribe's verified Complaint.

Ignored by the Court of Appeals are charges in Petitioner's Complaint that (1) Respondents intentionally mismanaged the Tribe's Salt River rights and (2) Respondents have intentionally undertaken to negotiate away, sell, exchange, diminish and denigrate the Tribe's Salt River rights.[39] The Tribe separately prayed for relief against Respondents for their on-going, intentional mismanagement of the Tribe's rights. Those violations by Respondents of Petitioner Tribe's rights are ongoing and in no way involve litigating discretion.

The Court of Appeals made a *de novo* adjudication that Respondent Secretary Watt had vested in him "litigating discretion," which, most assuredly, he does not.[40]

D. Denial Of Petition For Rehearing And Of Petition For Rehearing En Banc

Petitioner Tribe sought a rehearing en banc. That petition was denied by the Court of Appeals.[41]

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[38] See, Appendix A to this Petition, p. 1a.

[39] See, pp. 6, *et seq.*, *supra*.

[40] See, 43 U.S.C. § 1457, which sets forth the powers of the Secretary of Interior and which in no sense relate to litigation.

[41] See, Appendix B to this Petition, at p. 4a.

ARGUMENT

REASONS FOR GRANTING PETITION FOR WRIT OF CERTIORARI

CONFLICTS BETWEEN COURT OF APPEALS' DECISION HERE AND COURTS OF APPEALS FOR THE NINTH AND TENTH CIRCUITS AND WITH THE COURT CREATE PRESSING NEED FOR GRANTING TRIBE'S PETITION [42]

Issue Of Transcendent Importance—Rule 17

A review on certiorari is an imperative necessity. As principal agents of the United States, trustee for Petitioner Tribe, Respondents (a) seek to diminish the Tribe's water rights for non-Indian, federal projects and (b) seek to subvert the Tribe's water rights to state jurisdiction.

Corrupt And Intentional Mismanagement Of Salt River Rights By Attorneys General And Secretaries Of Interior Is An Indisputable Fact Concerning Which Petitioner Is Entitled To Judicial Review

From the inceptive moment of the Salt River Federal Reclamation Project, successive Secretaries of Interior and Attorneys General have violated Indian rights for the benefit of that project. The corrupt conduct of the Secretaries of Interior and Attorneys General involve intentional mismanagement of the Tribe's Salt River rights.[43] Congress has reported that—then, as now—

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[42] Rule 17, Supreme Court Rules, "Jurisdiction On Writ Of Certiorari," para. 1:

> "A review on writ of certiorari . . . will be granted only when there are special and important reasons therefor. * * *
>
> "(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter . . . or has so far departed from the accepted and usual course of judicial proceedings, or has so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision."

[43] Appendix H to this Petition, Complaint, at pp. 42, *et seq.*, "A Corrupt History. . . ."

the Indian interests have been "most outrageously intermingled with the affairs of the Reclamation Service. . . ." [44] Stressed there by Congress is the fact that the Interior Department—Bureau of Reclamation—has operated in the "twilight zone" respecting Indian water rights. Congress then added that, if "fraud does not exist . . . the badges of fraud are evident." [45]

Corrupt conduct gave rise to these proceedings by Petitioner Tribe against Respondents for the purpose of protecting its invaluable Salt River rights against seizure by those officials.

Opinion Of Court Of Appeals Here For Review Conflicts Sharply With Opinions Of The Courts Of Appeals For The Ninth And Tenth Circuits

Obligations of Respondents require them to meet the most "exacting fiduciary standards" in preserving and protecting the Tribe's Salt River Rights.[46] By its opinion, the Court of Appeals effectively denied the Tribe's right of judicial review respecting the flagrant misconduct by Respondents. The Court of Appeals denied Petitioner Tribe's right to remedies against violations of the Code of Professional Responsibility. It is declared by the American Bar Association that a lawyer should never represent multiple clients with differing interests in litigation.[47] Respondent Attorney General Smith is immersed in conflicts of interest. That officer's judgment cannot be exercised "solely" for the benefit of Petitioner Tribe.

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[44] *Ibid.*, at pp. 42a, 43a.

[45] *Ibid.*, at p. 43a.

[46] See, p. 6, *supra*. See also, Bogert, *The Law Of Trusts And Trustees*, Rev. 2d ed., 1978, § 543, p. 197, "Trustee's Duty Of Loyalty To Beneficiaries," and cited authorities; see, Vol. 2, Scott, *Law Of Trusts*, "Duties Of The Trustee," § 169, p. 1297; Vol. I, *Restatement Of The Law Of Trusts Second*, § 170, "Duty Of Loyalty."

[47] American Bar Association, Code of Professional Responsibility, EC-1-15.

Neither Respondent should purport to act for Petitioner Tribe because their conduct is submerged in conflicting influences and loyalties proscribed by the Canons of Ethics.[48]

It has been admitted by representatives of the Attorney General that, due to conflicts of interest, their position in Indian water rights litigation is "untenable." [49] It has likewise been admitted that the Secretaries' "inherent conflicts of interest" result in Respondent Watt's asserting rights to the use of water diametrically opposed to Petitioner Tribe's interests in the Salt River.[50]

In a Presidential message to Congress, it has been declared that "No self-respecting law firm" would represent opposing clients in the manner which Respondents purport to represent Petitioner Tribe respecting the Tribe's Salt River rights.[51]

In sharp contrast to the opinion of the Court of Appeals presented here for review, the Court of Appeals for the Tenth Circuit said this to the Attorney General in regard to conflicts between the Secretary of Interior and the Pueblo Indians on the Rio Grande:

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[48] *Ibid.*, at EC-5-1.

[49] Indian Trust Counsel, Hearings before the Subcommittee on Indian Affairs of the Committee on Interior and Insular Affairs, U.S. Sen., 92nd Cong., 1st Sess., on S.2035, "A Bill To Provide for the Creation of the Indian Trust Counsel Authority, and for Other Purposes," November 22 & 23, 1971, at p. 15.

[50] *Ibid.*, at p. 12.

[51] Federal Protection of Indian Resources, Hearings before the Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary, U.S. Sen., 92nd Cong., 1st Sess., On Administrative Practices and Procedures Relating to Protection of Indian Natural Resources, October 19 & 20, 1971, Part 1, pp. 233-34. There, the Secretary of Interior and representatives of the Attorney General candidly admitted to the conflicts of interest between their non-Indian constituents and the Indians for whom they purport to act as agents of the Trustee United States.

> The claim that the Pueblos are adequately represented by government counsel is not impressive. Government counsel . . . concede that a conflict of interest exists between the proprietary interests of the United States and of the Pueblos.[52]

Continuing, the Court of Appeals declared that the Attorney General could not adequately represent both interests.[53] Identical concepts have been applied to the Secretary of Interior. Citing the *Aamodt* decision, the Tenth Circuit reviewed the conflicts of interest and declared that "representation" of the Indians "by the United States is not adequate." [54]

In sharp contrast to the opinion here for review, the Ninth Circuit, in its *Northern Cheyenne* decision under the heading "Conflicts of Interest," granted judicial review and declared that where, as here, the Attorney General purports to represent numerous federal agencies and entities, while simultaneously purporting to represent Indian tribes,[55] the representation by the Attorney General is "inadequate." [56]

The *Northern Cheyenne* and *San Carlos* opinions, regarding the issues of conflicts of interest, relative to Re-

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[52] New Mexico v. Aamodt, 537 F.2d 1102, 1106 (CA 10, 1976), *cert. den.*, 429 U.S. 1121 (1977).

[53] *Ibid.*

[54] Manygoats v. Kleppe, 558 F.2d 556 (CA 10, 1977).

[55] *Ibid.*, at p. 558. See, Appendix F to this Petition, at p. 15a, in which the Attorney General and the Secretary of Interior purport to represent seventeen (17) conflicting federal agencies and Indian tribes.

[56] Northern Cheyenne Tribe v. Adsit, *et al.*, 668 F.2d 1080, 1089 (CA 9, 1982), Petition for Certiorari filed May 21, 1982, No. 81-2188; see, also, San Carlos Apache Tribe v. Arizona, 668 F.2d 1093 (CA 9, 1982), Petition for Certiorari filed May 12, 1982, No. 81-2147, in which the Court of Appeals for the Ninth Circuit adopted in full the reasoning and analysis found in the Northern Cheyenne decision.

spondents Attorney General Smith and Secretary Watt, are final. They are not presented to this Court for review in the petitions for certiorari filed by the States of Arizona and Montana.[57] Thus, the Tribe's petition for judicial review respecting the improprieties of Respondents' conduct is ripe for review.

In the *Memorandum And Report On Preliminary Issues*[58] in the case of *Arizona v. California*, the conflicts of interest of the Attorney General are extensively reviewed.[59] Judge Tuttle cites *Trbovich v. United Mine Workers*,[60] and sets forth the following quotation:

> Even if the Secretary [of Labor] is performing his duties, broadly conceived, the union member may have a valid complaint about the performance of 'his lawyer.'[61]

In affirming the dismissal of Petitioner Tribe's Complaint for lack of subject matter jurisdiction,[62] the Court of Appeals for the District of Columbia Circuit is sharply at variance with the opinions of the Courts of Appeals for the Ninth and Tenth Circuits, and Special Master Tuttle in *Arizona v. California*, in which the Courts granted the Indian tribes there involved the right to judicial review respecting the conflicts of interest of the Attorney General and Secretary of Interior, which must preclude Respondents from representing the tribes in regard to water rights, all as prayed for here by the Tribe.

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[57] See, pp. 10, *et seq.*, *supra*.

[58] See, Report, filed August 28, 1979, Elbert P. Tuttle, Special Master, State of Arizona, Plaintiff v. State of California, *et al.*, Defendants, United States of America, Intervenor.

[59] *Ibid.*, at pp. 10, *et seq.*

[60] 404 U.S. 528 (1972).

[61] *Ibid.*, at p. 539.

[62] See, Appendix A to this Petition at p. 1a.

Court Of Appeals For The District Of Columbia Circuit Violates Criteria For Reviewability Established By This Court

In *Rusk v. Cort*, the Court held that only upon a showing of "clear and convincing evidence" of a contrary legislative intent should the courts restrict access to judicial review.[63]

In *Abbott Laboratories v. Gardner*, the Court reiterated that concept.[64] As contemplated by the Administrative Procedure Act, 5 U.S.C. § 701, the Court declared that the principle of "nonreviewability" is "not lightly to be inferred." [65] The Court emphasized that ". . . judicial review of . . . administrative action is the rule, and nonreviewability an exception. . . ." [66] There resides with Respondent Attorney General Smith the burden of demonstrating congressional intent to preclude judicial review in regard to Petitioner Tribe's verified Complaint.[67]

In *Scheuer v. Rhodes*, the Court explicitly ruled that the complaint is to be "construed favorably to the pleader." [68] The Court admonished that dismissal "for lack of subject matter jurisdiction" without an answer, "necessarily" limits the Courts' tasks to the facts admitted in the complaint.[69]

In *Barlow*, the Court stressed that "slight beneficiary indicia" will establish the right of a complainant to judi-

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[63] 369 U.S. 367, 379-80 (1962).

[64] 387 U.S. 136, 141 (1967).

[65] Barlow v. Collins, 397 U.S. 159, 166 (1970). See, Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc., 419 U.S. 281 (1974).

[66] Barlow v. Collins, 397 U.S. 159, 174 (1970).

[67] *Ibid.*

[68] 416 U.S. 232, 234-37 (1974).

[69] *Ibid.*, at p. 236.

cial review and "thus to reach the merits." [70] It is pointed out in *Barlow* that a different course would "commit the action wholly to agency discretion," as has been experienced by Petitioner Tribe by the conduct of the District Court and the Court of Appeals.[71]

1. *Respondent Secretary Watt's Conduct Is Subject To "Judicial Review"*

Intentional mismanagement by Respondent Watt of the Tribe's Salt River rights is extensively charged in Petitioner's Complaint and admitted by the Attorney General's Motion to Dismiss.[72]

In *Morton v. Ruiz*,[73] the Court reviewed the Secretarial obligations to Indian tribes. Reference was made to the fact that the Secretary of Interior had presented no reasons for failing to meet the requirements of the Administrative Procedure Act.[74] In securing to the Indians the right to judicial review, the Court declared that:

> The overriding duty of our Federal Government to deal fairly with Indians wherever located has been recognized by this Court on many occasions.[75]

The courts below clearly violate the concepts of *Ruiz*, stripping from Petitioner Tribe the right to have its day in court.

In *Morton v. Mancari*,[76] the Court stressed the need for the Secretary properly to perform his responsibilities. In

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[70] Barlow v. Collins, 397 U.S. 159, 175-76 (1970).

[71] *Ibid.*, at p. 175, note 9.

[72] See, pp. 6, *et seq.*, *supra*; see, also, p. 3, *supra*, "Allegations In Petitioner Tribe's Complaint To Be Taken As True."

[73] 415 U.S. 199 (1974).

[74] *Ibid.*, at p. 235.

[75] *Ibid.*, at p. 236.

[76] 417 U.S. 535 (1974).

denying Petitioner Tribe its right to judicial review, the Court of Appeals has acted in sharp contrast with other courts of appeals and with decisions of the Supreme Court.[77]

Over the protests of the Attorney General, the Court of Appeals for the Ninth Circuit declared that Secretarial discretion to allocate electricity is subject to judicial review.[78] In rejecting the contentions that the Secretarial power was not subject to judicial review pursuant to 5 U.S.C. § 702, the Ninth Circuit established the principle upon which it would conduct its judicial analysis and stressed that:

> . . . judicial reviewability of administrative action is the rule, and nonreviewability an exception which must be demonstrated. . . .[79]

To demonstrate the preclusion of judicial review there must be a showing of " 'clear and convincing evidence' of a legislative intent to restrict judicial review." [80] The Ninth Circuit cited *Citizens To Preserve Overton Park v. Volpe*.[81] The Court declared that the exception of "discretion" committed to an agency pursuant to the Administrative Procedure Act "is a very narrow one." [82] The Ninth Circuit emphasized that the exceptions to judicial review are limited to those rare instances where statutes are drawn in such broad terms that, in the given case,

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[77] See, Ickes v. Fox, 300 U.S. 82, 96 (1937).

[78] Arizona Power Pooling Association v. Morton, 527 F.2d 721 (CA 9, 1975), *cert. den.*, 424 U.S. 911 (1976).

[79] *Ibid.*, at p. 727.

[80] See, p. 17, *supra*, Barlow v. Collins, Abbott Laboratories v. Gardner and other cited decisions.

[81] 401 U.S. 402 (1971).

[82] Arizona Power Pooling Association v. Morton, 527 F.2d 721, 727 (CA 9, 1975), *cert. den.*, 424 U.S. 911 (1976).

"there is no law to apply." [83] That circumstance does not prevail here.

In *Santa Clara v. Andrus*,[84] the Court of Appeals declared that administrative action taken in violation of statutory authority is of no force and effect. There has been acceptance of that principle on numerous occasions, including but not limited to the Court's decision in *Ickes v. Fox*.[85]

In *Diamond Ring Ranch, Inc. v. Morton*,[86] the Court of Appeals for the Tenth Circuit rejected the contention that Secretarial authority under the Taylor Grazing Act is so broad that it actually "precludes judicial review" of the Secretary of Interior's actions. In rejecting that contention, the Court of Appeals declared:

> There is a presumption of reviewability for those agency actions that are alleged to be erroneous.[87]

Congressional enactments conferring upon the district courts jurisdiction over actions initiated by Indian tribes, which actions arise under the Constitution, laws and treaties of the United States, when read in conjunction with the Declaratory Judgments Act and the Administrative Procedure Act, 5 U.S.C. §§ 701(2), *et seq.*, underscore the errors committed by the District Court and the Court of Appeals.

2. *Intentional, Arbitrary And Capricious Conduct Of Respondent Attorney General Cannot Be Shrouded By Absolute Immunity From Judicial Review*

Intentional mismanagement of Petitioner's Salt River rights is admitted by Respondents. Litigating discretion of

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[83] *Ibid.*

[84] 572 F.2d 660 (CA 9, 1978), *cert. den.*, 439 U.S. 859 (1978).

[85] 300 U.S. 82 (1937).

[86] 531 F.2d 1397, 42 A.L.R. Fed. 336, 350 (CA 10, 1976).

[87] *Ibid.*, at p. 1406, note 7.

either Respondent is in no sense involved.[88] Erroneous concepts, contrary to fact and law, were adopted by the District Court [89] and, without a citation of authority and in plain and serious error affirmed by the Court of Appeals.[90]

In *Brownell, Attorney General, v. Tom We Shung*,[91] the Court held that an alien was entitled to judicial review in the federal district court challenging the "discretion" of the Attorney General. In declaring that a denial of judicial review was counter to the concepts of the Administrative Procedure Act, it was established that the Attorney General's discretion is not entitled to absolute immunity from judicial review.

The Court, in its *Accardi* decision, granted judicial review affording a petitioner the opportunity to prove his allegations against a discretionary determination by the Board of Immigration Appeals.[92]

Judicial review of an Attorney General's decision involving the Voting Rights Act of 1965 was granted.[93]

Contrary to its present decision, the Court of Appeals for the District of Columbia Circuit declared that there was no merit to the Attorney General's position that, "even when legally erroneous," that officer's determinations are immune from judicial review.[94] In its rejection of the Attorney General's claimed absolute immunity, the Court of Appeals, in *Levi*, cited *Abbott Laboratories*,

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[88] See, Appendix G to this Petition, at p. 18a.

[89] See, Appendix C to this Petition, at p. 6a.

[90] See, Appendix A to this Petition, at p. 1a.

[91] 352 U.S. 180 (1956).

[92] Accardi v. Shaughnessy, 347 U.S. 260 (1954).

[93] Harper v. Levi, Attorney General, 527 F.2d 53 (D.C. App. 1975).

[94] *Ibid.*

Barlow and *Brownell*,[95] declaring that the courts should not "restrict access to judicial review" absent clear and convincing evidence of a congressional intent to the contrary.[96]

In *Adams v. Richardson*,[97] contrary to its position here, the Court of Appeals for the District of Columbia Circuit reviewed extensively the courts' right to review alleged discretionary conduct. The Court stressed that the "discretionary exception" in the Administrative Procedure Act is a narrow one.[98] The Court rejected the assertions by the Attorney General that "the exercise of prosecutorial discretion by the Attorney General or by United States Atorneys" are beyond judicial review.[99] The Court of Appeals further rejected the argument declaring that the cases there relied upon by the Attorney General do not support the claim to "*absolute*" immunity from judicial review of the Attorney General's prosecutorial discretion.[100]

In reviewing the conduct of the Attorney General in *Joint Anti-Facist Refugee Committee v. McGrath, Attorney General*,[101] the Court stressed the obvious that there can be no "arbitrary fiat" in this Nation because it is implicit that the Government of the United States is

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[95] See, pp. 17, *et seq.*, *supra*.

[96] Harper v. Levi, Attorney General, 527 F.2d 53, 67 (D.C. App. 1975).

[97] 480 F.2d 1159 (D.C. App. 1973).

[98] *Ibid.*, at p. 1161.

[99] *Ibid.*, at p. 1162.

[100] *Ibid.* (Original emphasis). See, Vol. 43, Opinions, Attorney General, No. 19, March 30, 1979, citing Adams v. Richardson respecting "the exercise of discretion" by officials in the Executive Branch of the Government.

[101] 341 U.S. 126 (1951).

one of laws and not of men.[102] The Court rejected the contention that the "Attorney General has" power to "delegate to himself" the power to act arbitrarily.[103] To say that Respondent Attorney General Smith is above the law is entirely contrary to the concepts expressed in *Butz v. Economou*, in which the Court declared that:

> No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government from the highest to the lowest, are creatures of the law, and are bound to obey it.[104]

Here, the Court of Appeals, in error, declared that Respondent Attorney General Smith's "litigating judgment" and non-litigating judgment may be exercised by him in defiance of the law. In plain and serious error, the District Court and the Court of Appeals further projected that absolute immunity from judicial review to Respondent Secretary Watt. Most assuredly, there is no law to support the conclusions by the courts below—none was or can be cited.

Absolute Immunity From Judicial Review Cannot Be Used To Conceal Arbitrary And Capricious Conduct Of Respondent Attorney General Smith

Judicial review of the Attorney General's litigating judgment in the sensitive area of taking private property by eminent domain has been recognized where bad faith is charged.[105] Citing *Carmack* and numerous decisions, the Ninth Circuit declared that, where arbitrary, capricious or bad faith conduct is charged in condemnation

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[102] *Ibid.*, at p. 136.

[103] *Ibid.*, at p. 138.

[104] 438 U.S. 478, 506 (1978).

[105] United States v. Carmack, 329 U.S. 230, 243-44 (1946).

proceedings, judicial review is available.[106] That Court likewise added that judicial review of administrative exercise of condemning authority may well be required by the Administrative Procedure Act.[107]

Set forth immediately above are the precepts of the law that govern the review by the courts of the Attorney General's conduct. Stressed there is the fact that declaratory and injunctive relief of the character sought here by Petitioner Tribe against the arbitrary and capricious conduct of the Attorney General is not barred by absolute immunity. In explicit terms, Petitioner Tribe has pleaded and Respondent Attorney General Smith has admitted that his "litigating judgment" is pervaded with conflicts of interest in regard to Petitioner Tribe's Salt River rights.[108]

A careful analysis of the law as it exists today reveals a rejection of the concepts asserted by Respondent Attorney General Smith and adopted by the District Court and the Court of Appeals relative to "absolute immunity from judicial review" of the Attorney General's litigating judgment. Indeed, in *Adams v. Richardson*, the Court of Appeals for the District of Columbia Circuit declared that it does not adhere to the concept of *absolute* immunity of the Attorney General's prosecutorial discretion.[109]

It has been authoritatively declared that in recent years there has been a sharp modification in regard to the immunity of "prosecutorial discretion." [110] The change in judicial rationale is emphasized in the Court's *Marshall*

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[106] Southern Pacific Land Co. v. United States, 367 F.2d 161, 162 (CA 9, 1966).

[107] 5 U.S.C. §§ 701, *et seq.*

[108] See, pp. 4, *et seq.*, *supra.*

[109] See, p. 22, *supra.*

[110] Davis, *Administrative Law Treatise*, 1982 Supplement, ch. 9, "Enforcement Discretion," § 9:2, at pp. 190-91.

v. Jerrico Inc. decision.[111] On the subject, the last-cited authority declares that:

> The Supreme Court has decisively opened the door to judicial review, for abuse of discretion, of decisions to prosecute.[112]

That concept is evidenced by the decision of *Trbovich v. United Mine Workers of America, et al.*[113] There, it was held that union members could reject representation by the Secretary of Labor as their "lawyer." [114]

Commenting on the assertions by the Attorney General for the Secretary of Labor, that the decisions of the Secretary were immune from judicial review, the Court said this:

> The statute plainly imposes on the Secretary the duty to serve two distinct interests, which are related, but not identical.[115]

The disparate interests of the Secretary of Labor subjected the Secretary's litigating discretion to review of the character denied to Petitioner Tribe here. As stressed throughout, the Attorney General has the "duty to serve two distinct interests"; indeed, seventeen distinct interests.[116] Judicial review of that grave impropriety by the Attorney General should ensue.

In *Adams v. Richardson* [117] and Attorney General's Opinion,[118] the Court of Appeals for the District of

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[111] 446 U.S. 238, 249-50 (1980).

[112] Davis, *Administrative Law Treatise*, 1982 Supplement, at p. 192.

[113] 404 U.S. 528 (1972). See, p. 16, *supra*, *Memorandum And Report Of Preliminary Issues*, Arizona v. California, Report of Special Master, Judge Elbert P. Tuttle, at pp. 17, *et seq.*

[114] 404 U.S. 528, 539 (1972).

[115] *Ibid.*, at p. 538.

[116] *Ibid.* See, Appendix F to this Petition, at p. 16a.

[117] See, p. 22, *supra*.

[118] See, p. 22, note 100, *supra*.

Columbia Circuit affirmed the District Court's order requiring the Secretary of Health, Education, and Welfare to exercise "prosecutorial discretion" to enforce the enactments adopted by Congress. In *Dunlop v. Bachowski*, the prosecutorial discretion of the Secretary of Labor was held to be subject to judicial review.[119]

In denying Petitioner Tribe the right to be heard, the Court of Appeals, as emphasized,[120] undertook to constrict the relief sought by Petitioner involving intentional mismanagement of the Tribe's property for the benefit of federal reclamation projects constructed and administered by Respondent Secretary of Interior who, throughout the entire period, has acted in close concert with Respondent Attorney General Smith. Very much a part of the intentional mismanagement of the Tribe's Salt River rights was the effort of Respondent Attorney General Smith, over the repeated protests of Petitioner Tribe, to force the Tribe and its rights into the Maricopa County Court of the State of Arizona.[121]

It is important here that neither the District Court nor the Court of Appeals for the District of Columbia could cite or did cite any authority in declaring that the Tribe should not be heard in regard to its charges of conflicts of interest, partaking of bad faith, and arbitrary and capricious conduct, involving abuse of discretion, all as provided for in the Administrative Procedure Act relied upon by Petitioner Tribe.

The ruling of the court below declaring the Tribe may not have judicial review respecting the arbitrary and capricious conduct of Respondent Smith violating and threatening to violate Petitioner Tribe's Salt River right is "deeply unsound." [122]

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[119] 421 U.S. 560 (1975).

[120] See, p. 13, at para. C, *supra*.

[121] See, pp. 11, *et seq.*, *supra*.

[122] Davis, *Administrative Law Treatise*, 1982 Supplement, ch. 9, pp. 197, *et seq.*

The effort to force upon Petitioner Tribe the rejected and unwanted representation of Respondent Attorney General Smith is an on-going controversy, irrespective of the *Northern Cheyenne* and *San Carlos* decisions, which are here on petitions for certiorari.[123] Both Respondents assert, as against Petitioner Tribe, that they are empowered in the exercise of "litigating judgment" of the Attorney General to take the Tribe and its Salt River rights into litigation, notwithstanding the fact that the conduct of both officials is encompassed within irreconcilable conflicts of interest giving rise to bad faith and arbitrary and capricious conduct.[124] That indisputable fact and the intentional mismanagement of the Tribe's Salt River rights, which have nothing to do with litigating judgment, reveal the pressing necessity for the writ prayed for here by Petitioner Tribe.

There Are Conflicts Among The Decisions Of The Court Of Appeals Here For Review, The Courts Of Appeals For The Second Circuit, And Third Circuit

In dismissing both Respondents for lack of subject matter jurisdiction, the Court of Appeals for the District of Columbia Circuit, in effect, declared that those officers were protected in their arbitrary and capricious conduct by the concept of sovereign immunity from suit. There can be no other justification for that opinion. In so holding, the Court of Appeals is sharply at variance with the principles enunciated in *Johnsrud v. Carter, President.*[125] In reversing a district court's order of dismissal for lack of subject matter jurisdiction, the Third Circuit quoted the Administrative Procedure Act, 5 U.S.C. § 702 and declared that:

> . . . in an equitable action . . . seeking 'non-statutory' review of agency action, the Administrative Proce-

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[123] See, Appendix I to this Petition, at p. 154a.

[124] See, pp. 13, *et seq., supra.*

[125] 620 F.2d 29, 30 (CA 3, 1980).

> dure Act specifically 5 U.S.C. § 702 (1976), serves as a waiver of the United States' sovereign immunity.[126]

In its decision, the Court of Appeals for the Third Circuit referred to its earlier decision in *Jaffee*.[127] The Third Circuit stressed that *Jaffee* and *Johnsrud* were in conflict with the decision of *Watson v. Blumenthal* rendered by the Second Circuit.[128] Respecting *Watson v. Blumenthal*, the Court of Appeals for the Third Circuit declared: "We are constrained to disagree with the Second Circuit. . . ." [129]

In *Watson v. Blumenthal*, the Second Circuit declared that the 1976 amendment of the Administrative Procedure Act [130] did not remove the defense of sovereign immunity in actions brought under the "federal question jurisdiction statute." In arriving at its conclusion, the Second Circuit cited *Califano v. Sanders*,[131] which, it has been stated, is rendered moot by the 1976 amendment to 5 U.S.C. § 702.

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[126] *Ibid.*, at p. 31. See, Helstokski v. Goldstein, 552 F.2d 564 (CA 3, 1977). See, also, Hill v. United States, 571 F.2d 1098, 1102 (CA 9, 1978).

[127] Jaffee v. United States, 593 F.2d 712, 718 (CA 3, 1978), *cert. den.*, 441 U.S. 961 (1979).

[128] 586 F.2d 925, 932 (CA 2, 1978).

[129] Jaffee v. United States, 593 F.2d 712, 718 (CA 3, 1978), *cert. den.*, 411 U.S. 961 (1979). See, Jaffee v. United States, 663 F.2d 1226 (CA 3, 1981). There, the Court of Appeals declared:

> "In view of existence of alternative remedy under Veterans' Benefits Act and effect of suits on military effectiveness, former soldier and wife did not have cause of action directly under Constitution. . . ."

[130] 5 U.S.C. § 702.

[131] 430 U.S. 99, 105 (1977). See, Vol. 14, *Federal Practice And Procedure*, 1981 Pocket Part, § 3655, at p. 27.

In *Doe v. Civiletti, Attorney General of the United States*,[132] the Court of Appeals for the Second Circuit reiterated the proposition expressed in *Watson v. Blumenthal* and declared that 5 U.S.C. § 702 does not serve as a waiver of sovereign immunity for the United States in cases arising under the federal question jurisdiction statute, 28 U.S.C. § 1331, which uses the same language as 28 U.S.C. § 1362, invoked by Petitioner Tribe in this proceeding.

It is apparent that the Court of Appeals for the District of Columbia Circuit has joined the Second Circuit in its interpretation of the language of 5 U.S.C. § 702 in denying that the 1976 amendment to that Act waives the sovereign immunity of the United States from suit in cases arising under the Constitution, laws and treaties of the United States, the language of 28 U.S.C. § 1362 invoked here. On the subject, there has been declared that:

> The courts are split on the question of whether Section 702 as amended waives sovereign immunity in actions seeking equitable relief under Section 1331 of Title 28.[133]

Similar to 28 U.S.C. § 1331, 28 U.S.C. § 1362 confers upon the United States district courts jurisdiction for Indian actions arising under "the Constitution, laws, or treaties of the United States."

The Court of Appeals for the District of Columbia Circuit ignored the mandate of Congress when it waived the immunity of the United States from suit in non-monetary proceedings arising under the Constitution and laws of the United States. It is plain and serious error to deny Petitioner Tribe its rights to judicial review

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[132] Doe v. Civiletti, United States Attorney General, 635 F.2d 88 (CA 2, 1980).

[133] Vol. 14, *Federal Practice And Procedure*, Wright, Miller & Cooper, 1981 Pocket Part, § 3655, "Actions Against Federal Agencies and Officers," at p. 24.

respecting intentional mismanagement of the Tribe's Salt River rights for the benefit of the non-Indian projects and purposes, all as alleged by the Tribe and admitted here.[134]

CONCLUSION

In denying Petitioner White Mountain Apache Tribe judicial review of Respondents' unauthorized and illegal conduct, the Court of Appeals for the District of Columbia Circuit departs from the basic concepts enunciated by the Court in *Ex Parte Young*[135] and the long line of decisions that followed it. Ignored completely by the dismissal of the Tribe's Complaint and the affirmance of that dismissal is the Court's caveat in *Butz v. Economou*[136] that no officer of the National Government may act in defiance of the law. Not only did the Court of Appeals depart from established principles of law by its affirmance of the District Court's dismissal of Petitioner Tribe's verified Complaint, but its opinion provides judicial approval of Respondent Secretary Watt's and Respondent Attorney General Smith's intentional mismanagement of Petitioner Tribe's Salt River rights.

Accordingly, predicated upon the plain and serious errors of the Court of Appeals, Petitioner White Mountain Apache Tribe respectfully prays the granting of its Petition for a Writ of Certiorari.

Respectfully submitted,

WILLIAM H. VEEDER
Suite 920
818 18th Street, N.W.
Washington, D.C. 20006
(202) 466-3890

Attorney for
White Mountain Apache Tribe
Petitioner

---

[134] See, pp. 14, *et seq.*, *supra*.

[135] 209 U.S. 123, 143 (1908).

[136] 438 U.S. 478, 496-504 (1978).

81-2334

No. 82-

Office - Supreme Court, U.S.
FILED
JUN 22 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

THE WHITE MOUNTAIN APACHE TRIBE, a body corporate established pursuant to § 16 of the Act of June 18, 1934 (48 Stat. 987; 25 U.S.C. 476) and duly recognized by the Secretary of the Interior,

Petitioner,

v.

WILLIAM FRENCH SMITH,
Attorney General of the United States of America,

and

JAMES G. WATT, Secretary of the
United States Department of the Interior,

Respondents.

APPENDIX TO

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

WILLIAM H. VEEDER
Suite 920
818 18th Street, N.W.
Washington, D.C. 20006
(202) 466-3890

Attorney for
White Mountain Apache Tribe
Petitioner

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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APPENDIX A

Not to be Published—See Local Rule 8(f)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1981

Civil Action No. 81-01205

No. 81-1944

WHITE MOUNTAIN APACHE TRIBE,
Appellant
v.

WILLIAM FRENCH SMITH, *et al.*,

[Filed Mar. 16, 1982]

Appeal from the United States District Court for the District of Columbia

Before: WALD, MIKVA and EDWARDS, Circuit Judges

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel. On consideration of the foregoing, it is

ORDERED AND ADJUDGED, by this Court, that the judgment of the District Court appealed from herein is affirmed for the reasons set forth in the attached memorandum.

Per Curiam
For the Court

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

MEMORANDUM

The White Mountain Apache Tribe brought suit in the United States District Court for the District of Columbia, to enjoin the Attorney General and the Secretary of the Interior from participating in litigation in Arizona state court, No. W-1, that seeks an adjudication of water rights in the Salt River basin.[1] As bases for jurisdiction, the Tribe alleged the Administrative Procedure Act, 5 U.S.C. § 702 (1976); the Declaratory Judgments Act, 28 U.S.C. §§ 2201-02 (1976 & Supp. III 1979); and the statute extending general federal question jurisdiction to Indian tribes, 28 U.S.C. § 1362 (1976). The District Court dismissed the suit for lack of subject matter jurisdiction, reasoning that neither these nor any other statute conferred subject matter jurisdiction over an effort to enjoin the Attorney Gen-

---

[1] The present posture of the Arizona litigation is complex. In *In Re the General Adjudication of the Rights to Use Water in the Salt River Watershed Above Granite Reef Dam, Excluding the Verde River Tributary*, No. W-1, what is sought is a purported general adjudication of the rights to use water in a portion of the Salt River watershed. The United States, while preserving its rights to appear in No. W-1 to assert claims for water rights held in trust for Indian tribes, has moved to dismiss No. W-1 for lack of jurisdiction under the McCarran Amendment waiver of sovereign immunity in general water rights adjudications, 43 U.S.C. § 666 (1976). Additionally, the federal District Court for the District of Arizona dismissed an effort by a number of Indian tribes with interest in the Salt River to remove the litigation to federal court, in favor of the state court proceeding. *In re Determination of Conflicting Rights to the Use of Water from the Salt River Above Granite Reef Dam*, 484 F. Supp. 778 (D. Ariz. 1980). The Ninth Circuit has recently reversed and remanded to the District Court for a determination of whether Arizona has repealed a disclaimer of jurisdiction over Indian lands, which disclaimer would bar the Arizona courts from asserting jurisdiction over the Indian water rights at issue in No. W-1. *San Carlos Apache Tribe v. Arizona*, No. 80-5137 (9th Cir. Feb. 23, 1982). *See Northern Cheyenne Tribe v. Adsit*, No. 79-4887 (9th Cir. Feb. 22, 1982) (McCarran Amendment does not implicitly repeal state disclaimers to the exercise of jurisdiction over Indian lands).

eral's exercise of litigating judgment. We agree with the District Court insofar as it held that it lacked subject matter jurisdiction over this attempt by the Attorney General to exercise his litigating discretion.

We note that the complaint alleges generally, and the Tribe argues vigorously, that the Secretary of the Interior has violated his trust responsibilities towards them. The specific violation complained of here, however, is the Attorney General's decision on behalf of the Secretary to participate in the Arizona litigation. So the trial judge read the complaint, and it is on this basis that we affirm. Our decision intimates no views about federal jurisdiction under 28 U.S.C. § 1362 (1976) or otherwise, over a suit by this or any other tribe, challenging other actions by the Secretary of the Interior with respect to the exercise of his trust responsibilities. Nor do we express any views about the merits of the litigation now pending in the state and federal courts in Arizona.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1981

Civil Action No. 81-01205

No. 81-1944

WHITE MOUNTAIN APACHE TRIBE,
Appellant

v.

WILLIAM FRENCH SMITH, *et al.*

Argued 3-2-82

Before: Robinson, Chief Judge, Wright, Tamm, MacKinnon, Robb, Wilkey, Wald, Mikva, Edwards, Ginsburg and Bork, Circuit Judges

ORDER

Appellant's suggestion for rehearing *en banc* has been circulated to the full Court and no member of the Court has requested the taking of a vote thereon. On consideration of the foregoing, it is

ORDERED by the Court *en banc*, that the aforesaid suggestion is denied.

Per Curiam
FOR THE COURT:

GEORGE A. FISHER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

[Filed Apr. 8, 1982]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1981

Civil Action No. 81-01205

No. 81-1944

WHITE MOUNTAIN APACHE TRIBE,
Appellant
v.

WILLIAM FRENCH SMITH, *et al.*

Argued 3-2-82

Before: Wald, Mikva and Edwards, Circuit Judges

ORDER

On consideration of appellant's petition for rehearing, filed March 26, 1982, it is

ORDERED by the Court that the aforesaid petition is denied.

Per Curiam
FOR THE COURT:

GEORGE A. FISHER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

[Filed Apr. 8, 1982]

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil No. 81-1205

THE WHITE MOUNTAIN APACHE TRIBE,
Plaintiffs,

v.

WILLIAM FRENCH SMITH, *et al.*,
Defendants.

[Filed Jun. 23, 1981]

ORDER

Having considered the motion of the United States to dismiss this action to enjoin the appearance of the Attorney General in proceedings pending in Maricopa County Superior Court, Arizona, and the memoranda and auxiliary documents filed by the parties in support of and in opposition to the motion, the Court concludes that neither 5 U.S.C. § 701, *et seq.*, 28 U.S.C. 1362, nor 28 U.S.C. §§ 2201-2202, nor any other statute gives this Court jurisdiction over the Attorney General's exercise of litigating judgment. In addition, plaintiff has an adequate remedy at law in the state court proceeding subject, as it is, to potential appellate review in the United States Supreme Court. Accordingly, it is hereby

ORDERED: That the complaint filed herein by the White Mountain Apache Tribe is dismissed.

/s/ Louis F. Oberdorfer
United States District Judge

Date: June 22, 1981

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 81-1205

THE WHITE MOUNTAIN APACHE TRIBE, ET CETERA,
Plaintiff

v.

WILLIAM FRENCH SMITH, *et al.*,
Defendant

[Filed Jul. 21, 1981]

ORDER

Upon consideration of plaintiff's motion to amend the order of this Court entered June 23, 1981, dismissing the complaint in the above captioned action, and upon consideration of the entire record herein, it is this 21st day of July, 1981, hereby:

ORDERED: That the motion should be and is hereby denied.

/s/ Louis F. Oberdorfer
United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil No. 81-1205

THE WHITE MOUNTAIN APACHE TRIBE, a body corporate established pursuant to § 16 of the Act of June 18, 1934 (48 Stat. 987; 25 U.S.C. 476) and duly recognized by the Secretary of the Interior, Whiteriver, Arizona,

Plaintiff,

vs.

WILLIAM FRENCH SMITH, Attorney General of the United States of America, and
JAMES G. WATT, Secretary of the United States Department of the Interior,

Defendants.

MOTION TO AMEND JUNE 23, 1981 ORDER

Comes now the White Mountain Apache Tribe, Plaintiff in the above-entitled case, to allege and aver that:

* * * *

7. In this Court's Order, filed June 23, 1981, the Court denied that it had jurisdiction ". . . over the Attorney General's exercise of litigating judgment." In addition, the Court declared that the Tribe ". . . has an adequate remedy at law in the state court proceeding. . . ." No reference is made to the Secretary of the Interior; nor is the relief sought by the Tribe against that official mentioned, which relief goes far beyond the state court proceeding.

8. Provision is made in Rule 54(b) of the Federal Rules of Civil Procedure that where

> ". . . more than one claim for relief is presented in an action [as here] . . . or when multiple parties are involved [as here], the court may direct the entry

of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment."

9. The White Mountain Apache Tribe is of the view that Rule 54(b) is applicable to these proceedings and that, absent a certificate from this Court, the order, as entered, might well be declared to lack the finality requisite for an appeal.

WHEREFORE, THE WHITE MOUNTAIN APACHE TRIBE RESPECTFULLY PRAYS THIS COURT:

1. to amend its June 23, 1981 Order by affixing to it the certificate in conformity with the provisions of Rule 54(b) of the Federal Rules of Civil Procedure, to which reference is made above; or

* * * *

7 July 1981

Respectfully submitted

/s/ William H. Veeder
WILLIAM H. VEEDER
Attorney for
White Mountain Apache Tribe

Suite 920
818 18th Street, N.W.
Washington, D.C. 20006

[202] 466-3890

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil No. 81-1205

THE WHITE MOUNTAIN APACHE TRIBE, a body corporate established pursuant to § 16 of the Act of June 18, 1934 (48 Stat. 987; 25 U.S.C. 476) and duly recognized by the Secretary of the Interior, Whiteriver, Arizona,

Plaintiff,

vs.

WILLIAM FRENCH SMITH, Attorney General of the United States of America, and
JAMES G. WATT, Secretary of the United States Department of the Interior,

Defendants.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO AMEND JUNE 23, 1981 ORDER

Reference is made to the motion, of which this memorandum is in support. There, the White Mountain Apache Tribe seeks to protect its rights and interests against the unauthorized acts of both the Secretary of Interior and the Attorney General.

It is asserted and the Tribe is prepared to prove that the conduct of the Secretary of Interior and the Attorney General has in the past and threatens at the present time to confiscate the rights to the use of water of the White Mountain Apache Tribe for the benefit of non-Indian projects, constructed and administered by the Secretary of Interior.

It is likewise charged that both the Attorney General and the Secretary of Interior have conflicts of interest that permeate all of the actions which they take in regard to the Salt River and its tributaries. Thus it is that

the rights, titles and interests of the White Mountain Apache Tribe are subject to confiscation due to the illegal and unauthorized acts which the Secretary of Interior and the Attorney General have taken or threaten to take.

To protect the White Mountain Apache Tribe, it is essential to have adjudged, declared and determined the nature, character and extent of the rights of the White Mountain Apache Tribe as they relate to the claims asserted by both the Secretary of Interior and the Attorney General. For example and entirely without authority, it is asserted by the Attorney General that, in some manner, that official can assert rights and interests in and to the Salt River independent of those claimed by the White Mountain Apache Tribe. That profession of interest by the Attorney General is wholly without basis.

The White Mountain Apache Tribe is entitled to be heard against both the Attorney General and the Secretary of Interior in regard to the separate and individual threats made by those officials against the rights, titles, and interests of the Tribe in and to the waters of the Salt River and its tributaries.

On its face, this Court's Order, filed June 23, 1981, would appear to dismiss the complaint filed by the White Mountain Apache Tribe on May 22, 1981, as to the Attorney General. There is no mention of the Secretary of Interior in the Order, nor does there appear to be any basis for the dismissal of the Tribe's complaint against that official.

As recited in the motion, of which this memorandum is in support, power resides in this Court separately to certify that the June 23, 1981 Order is final as to the Attorney General subject to the condition that the certification provided for in Rule 54(b) of the Federal Rules of Civil Procedure be made on the "express determination that there is no just reason for delay" in regard to

the dismissal of the proceedings against the Attorney General.

It is equally clear that the Tribe is suffering hardship and injustice by any delay in having this Court's June 23, 1981 Order reviewed by the Court of Appeals.

Confronted with extensive authority respecting the need for finality in regard to all issues and parties,[1] the Tribe respectfully requests this Court to execute the certificate provided for in Rule 54(b). The Tribe requests that course be taken expeditiously to the end there may be resolved the crucial issues here presented. In its present form, the June 23, 1981 Order would not stand the controlling test of finality requisite to perfect the appeal that the Tribe is in the process of taking.

7 July 1981

Respectfully submitted,

/s/ William H. Veeder
WILLIAM H. VEEDER
Attorney for
White Mountain Apache Tribe
Suite 920
818 18th Street, N.W.
Washington, D.C. 20006
[202] 466-3890

[Certificate of Mailing Omitted in Printing]

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[1] See, Arlinghaus v. Ritenour, 543 F.2d 461 (CA 2, 1976); see also, Vol. VI, Moore's *Federal Practice*, sec. 54.41[3], *et seq.*

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil No. 81-1205

THE WHITE MOUNTAIN APACHE TRIBE, a body corporate established pursuant to § 16 of the Act of June 18, 1934 (48 Stat. 987; 25 U.S.C. 476) and duly recognized by the Secretary of the Interior, Whiteriver, Arizona,

Plaintiff,

vs.

WILLIAM FRENCH SMITH, Attorney General of the United States of America, and
JAMES G. WATT, Secretary of the United States Department of the Interior,

Defendants.

ORDER

Having considered the motion of the United States to dismiss this action to enjoin the appearance of the Attorney General in proceedings pending in Maricopa County Superior Court, Arizona, and the memoranda and auxiliary documents filed by the parties in support of and in opposition to the motion, the Court concludes that neither 5 U.S.C. § 701, *et seq.*, 28 U.S.C. 1362, nor 28 U.S.C. §§ 2201-2202, nor any other statute gives this Court jurisdiction over the Attorney General's exercise of litigating judgment. In addition, plaintiff has an adequate remedy at law in the state court proceeding subject, as it is, to potential appellate review in the United States Supreme Court.

The Court, on June 23, 1981, dismissed the complaint of the White Mountain Apache Tribe against the Attorney General. Respecting that June 23, 1981 Order, the Court expressly determines that there is no just reason for delay in entering the final judgment of dis-

missal, all in accordance with Rule 54(b) of the Federal Rules of Civil Procedure.

Accordingly, it is hereby

ORDERED AND DECREED: That final judgment be entered dismissing the complaint of the White Mountain Apache Tribe as against the Attorney General only.

DATE: ————

LOUIS F. OBERDORFER
U.S. District Judge

APPENDIX F

IN THE SUPERIOR COURT OF MARICOPA COUNTY STATE OF ARIZONA

No. W-1

IN RE: GENERAL ADJUDICATION OF THE RIGHT TO USE WATER IN THE SALT RIVER WATERSHED ABOVE GRANITE REEF DAM, EXCLUDING THE VERDE RIVER TRIBUTARY

RESPONSE OF THE UNITED STATES TO THE ORDER OF FEBRUARY 23, 1981

The United States files this response to this court's order of February 23, 1981, which required the United States to submit a list of "agencies, beneficiaries, and others bearing [a] relationship to the United States" for which the United States would ultimately file a claim in this proceeding.

The United States, by filing this document does not concede that this court has jurisdiction over the United States, its agencies, beneficiaries, or others bearing a relationship to the United States, since this action may well not conform to the requirements of 43 U.S.C. 666, The McCarran Amendment. The United States would also point out that the doctrine of tribal sovereign immunity, as explicated in the case of *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49 (1978), would oust this court of jurisdiction over the Indian tribes listed herein.

The United States is still troubled by the scope of this proceeding. There has been no definitive statement by petitioner or the State of Arizona concerning what geographic area and what interests in water—surface and subsurface—are intended to be adjudicated herein. Until such a definitive statement is made, the United States is powerless to challenge the jurisdiction of the court,

since we cannot assert that this is *not* a general adjudication until we know what is to be adjudicated.

Given these uncertainties, the United States supplies the following list of federal agencies and Indian tribes for which it may file claims in the proceeding:

Federal Agencies

United States Department of the Interior

1. Bureau of Land Management
2. Water and Power Resources Service
3. National Park Service
4. Fish and Wildlife Service

Department of the Defense

1. United States Air Force
2. United States Army

Department of Agriculture

1. National Forest Service

Indian Reservations

1. San Carlos Apache Indian Reservation
2. White Mountain Apache Indian Reservation
3. Tonto Apache Indian Reservation
4. Ft. McDowell Indian Reservation
5. Yavapai-Prescott Indian Reservation
6. Salt River Indian Reservation
7. Gila River Indian Reservation
8. Gila Bend Papago Reservation
9. Ak-Chin Pima-Maricopa Indian Reservation
10. Camp Verde Indian Reservation

Depending upon the geographic scope of these proceedings, and depending upon the interests to be ad-

judicated herein, the United States may or may not make claims on behalf of all the entities listed above.

The United States will file claims for the Indian Reservations listed for the United States' legal interest as a trustee of the water rights of the respective reservations. The Indian tribes have separate equitable interests in the water rights of their reservations. The United States believes that certain of the Indian tribes may file claims in this proceeding which may differ from the claims that the United States will make for its interest as trustee.

Respectfully submitted,

/s/ Steven E. Carroll
STEVEN E. CARROLL
Attorney, Department of Justice
Land and Natural Resources Division
10th and Pennsylvania Avenue, N.W.
Washington, D.C. 20530
Telephone: (202) 633-2068

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil No. 81-1205

THE WHITE MOUNTAIN APACHE TRIBE, a body corporate established pursuant to § 16 of the Act of June 18, 1934 (48 Stat. 987; 25 U.S.C. 476) and duly recognized by the Secretary of the Interior,

v.

WILLIAM FRENCH SMITH, Attorney General of the United States of America, and

JAMES G. WATT, Secretary of the United States Department of the Interior.

MOTION TO DISMISS

The United States moves to dismiss the complaint filed by the White Mountain Apache Tribe seeking a preliminary injunction and declaratory relief on the grounds that this court has no jurisdiction over the subject matter of this action because the decision whether or not to file a pleading in a pending action is one committed to the discretion of the Executive Branch by the Constitution and to the Attorney General by 28 U.S.C. §§ 515 and 516 and may not be interfered with by plaintiff or this court.

STEVEN E. CARROLL
Attorney, Department of Justice
Land and Natural Resources Division
10th and Pennsylvania Avenue, N.W.
Washington, D.C. 20530
Telephone: (202) 633-2068

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil No. 81-1205

THE WHITE MOUNTAIN APACHE TRIBE, a body corporate established pursuant to § 16 of the Act of June 18, 1934 (48 Stat. 987; 25 U.S.C. 476) and duly recognized by the Secretary of the Interior,

vs.

WILLIAM FRENCH SMITH,
Attorney General of the United States of America,

and

JAMES G. WATT, Secretary of the
United States Department of the Interior.

COMPLAINT
FOR DECLARATORY JUDGMENT AND
FOR PERMANENT INJUNCTION

WILLIAM H. VEEDER
Attorney for
White Mountain Apache Tribe

Suite 920
818 18th Street, N.W.
Washington, D.C. 20006

[202] 466-3890

COMPLAINT FOR PRELIMINARY INJUNCTION MAINTAINING STATUS QUO; FOR DECLARATORY JUDGMENT; AND FOR OTHER RELIEF

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil No. 81-1205

THE WHITE MOUNTAIN APACHE TRIBE, a body corporate established pursuant to § 16 of the Act of June 18, 1934 (48 Stat. 987; 25 U.S.C. 476) and duly recognized by the Secretary of the Interior,

vs.

WILLIAM FRENCH SMITH,
Attorney General of the United States of America,

and

JAMES G. WATT, Secretary of the
United States Department of the Interior.

COMPLAINT
FOR DECLARATORY JUDGMENT AND
FOR PERMANENT INJUNCTION

The White Mountain Apache Tribe, Fort Apache Indian Reservation, Whiteriver, Arizona, a duly organized body corporate, established pursuant to the constitution and bylaws formulated and adopted by the White Mountain Apache Tribe, the governing body of that Tribe having been duly recognized by the Secretary of Interior, all in accordance with § 16 of the Act of June 18, 1934 (48 Stat. 987; 25 U.S.C. 476), complains, alleges, and avers and respectfully prays this Court as follows.

JURISDICTION

Jurisdiction has been conferred upon this Court and now resides with this Court:

1. Pursuant to 28 U.S.C. 1362, by which Congress, among other things, provides that the United States District Court

   ". . . shall have original jurisdiction of all civil actions, brought by any Indian tribe . . . wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States."

2. Pursuant to the Declaratory Judgment Act, 28 U.S.C. 2201, *et seq.*, conferring jurisdiction on this Court where, as here, an actual and genuine controversy exists by reason of the arbitrary, capricious and illegal conduct of the Attorney General of the United States, acting in concert with the Secretary of Interior, pursuant to which those agents of the Trustee United States, acting without a scintilla of authority, seek to impose upon the White Mountain Apache Tribe the unwanted representation by the Attorney General in a constricted, limited and truncated water adjudication in a state court that does not have jurisdiction over the Tribe; and

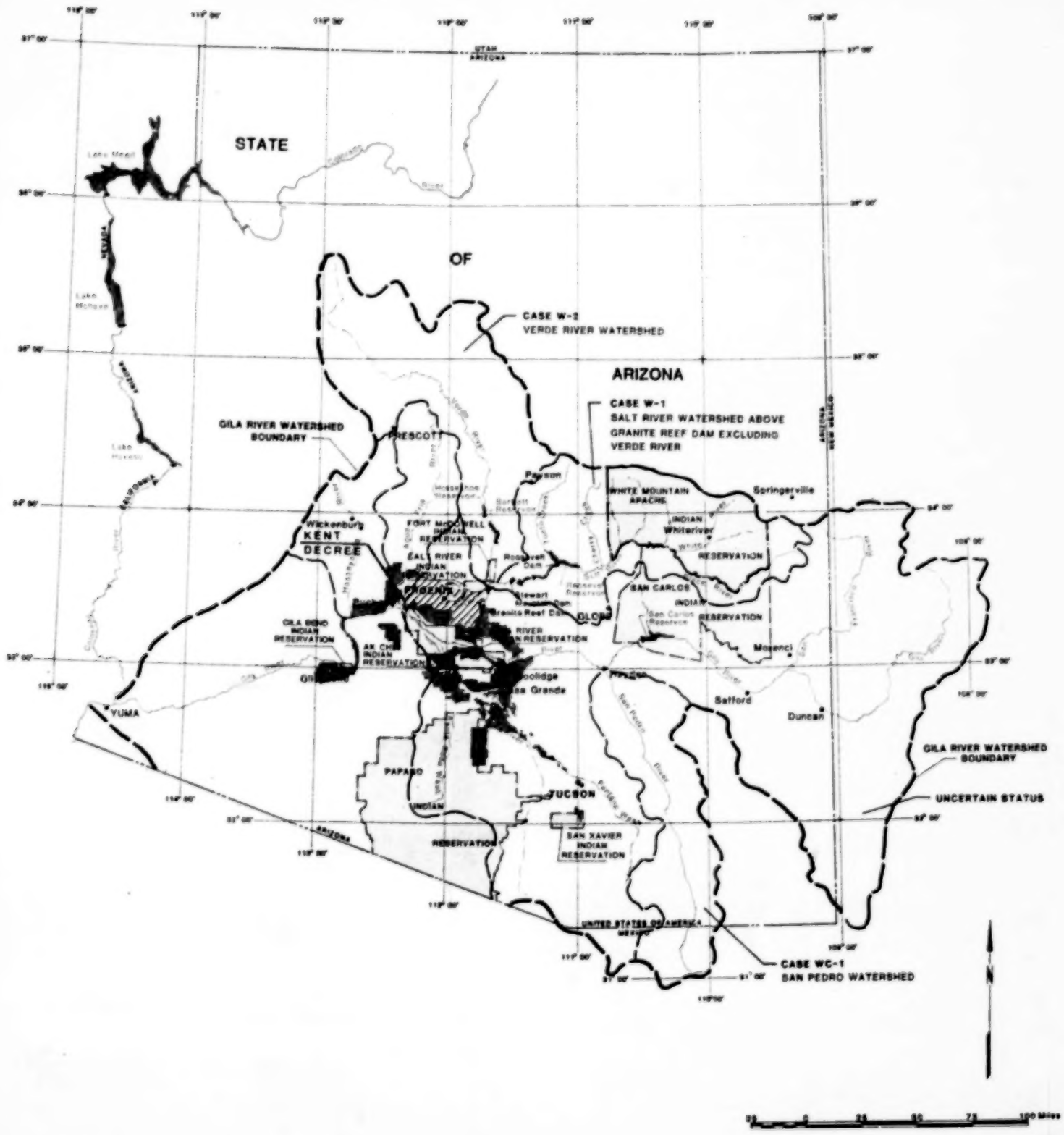
3. Pursuant to the Administrative Procedure Act, the White Mountain Apache Tribe, being threatened by final agency action, for which there is no adequate remedy, stemming from the activities of the Attorney General in excess of statutory authority, all as provided for in 5 U.S.C. 701(a)(1), (2); 5 U.S.C. 702, Right of Review; 5 U.S.C. 704, Action Reviewable; 5 U.S.C. 706, Scope of Review.

I.

ARBITRARY AND CAPRICIOUS CONDUCT BY THE ATTORNEY GENERAL, BEYOND THE SCOPE OF THAT OFFICER'S AUTHORITY, THREATENS PLAINTIFF WHITE MOUNTAIN APACHE TRIBE WITH IRREPARABLE AND CONTINUING DAMAGE

Tribe's Invaluable Rights To The Use Of Water In Salt River And Its Tributaries Immune From Jurisdiction Or Control By State Court— Tribe Seeks To Maintain That Status

From time immemorial, the White Mountain Apache Tribe has occupied the lands comprising the Fort Apache Indian Reservation, created by an Executive Order dated November 9, 1871. The Congress of the United States has fully recognized the Tribe's title to those lands. The White Mountain Apache Tribe asserts here that it holds full equitable title to the lands comprising the Fort Apache Indian Reservation and that naked legal title is held by the United States solely for the benefit of the White Mountain Apache Tribe.



LEGEND

INDIAN RESERVATIONS

IRRIGATED LAND

LOCATION MAP

PLATE NO. 1

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II.

The Salt River and its tributaries rise upon, traverse, border and underlie the Fort Apache Indian Reservation. Full equitable title resides in the White Mountain Apache Tribe to prior, superior, and paramount rights to the use of water in the Salt River and its tributaries, entitling the Tribe annually to divert and utilize three hundred thousand (300,000) acre-feet of water.

III.

An agent of the Secretary of the Interior, the Salt River Valley Water Users' Association has initiated in Superior Court of Maricopa County, Arizona, an action entitled "IN RE THE GENERAL ADJUDICATION OF ALL RIGHTS TO USE WATER IN THE SALT RIVER SYSTEM AND SOURCE ABOVE GRANITE REEF DAM, EXCLUDING THE VERDE RIVER TRIBUTARY." That State Court proceedings is hereafter referred to as the "Restricted Adjudication of a Segment of the Salt River, W-1," or "W-1."

IV.

Immediately [preceding] this page is a Location Map displaying the constricted area within "W-1" and the vast area excluded from it. It is pertinent in regard to "W-1" that a representative of the Attorney General made this statement:

> "• • • we have grave doubts that ["W-1"] both *geographically and as to the interests in water* • • • [can] • • • *be categorized as a general adjudication within the terms of the McCarran Amendment.*" [Appendix L, p. 127a] [Emphasis supplied]

V.

Inherent, sovereign power resides in the White Mountain Apache Tribe. By reason of its sovereign status, the White Mountain Apache Tribe is immune from suit, absent waiver of that immunity.

VI.

Neither Congress nor the Tribe has waived the sovereign immunity of the White Mountain Tribe in and to its invaluable rights to the use of water in the Salt River and its tributaries. Nevertheless, the Tribe's immunity, and its invaluable rights in the Salt River and its tributaries, are threatened by the Attorney General's declaration that the Department of Justice will appear on behalf of the White Mountain Apache Tribe, over the Tribe's strenuous objections in the "Restricted Adjudication of a Segment of the Salt River, W-1."

VII.

The White Mountain Apache Tribe, acting through its governing body, the Tribal Council, by resolution and otherwise, has repeatedly advised both the Attorney General and the Secretary of Interior that it will vigorously resist any attempt by the Attorney General to force upon the Tribe that officer's rejected and unwanted representation in the pending proceedings in the Superior Court of Maricopa County, initiated by an agent of the Secretary of the Interior to adjudicate some, but far from all, of the rights to the use of water in the Salt River and its tributaries.

VIII.

Arbitrary, Capricious And Unauthorized Conduct By The Attorney General Threatens To Violate The Tribe's Constitutional, Civil, Human And Property Rights

An attorney for the Department of Justice, acting for and on behalf of the Attorney General, has advised counsel for the White Mountain Apache Tribe as follows:

> ". . . on or before June 1, 1981, the United States will file a pleading in the Superior Court, Maricopa County, in a case entitled 'In Re General Adjudication of Salt River, No. W-1' [sic], indicating that the

United States will file a claim as trustee for the reserved water rights of the White Mountain Apache Tribe." [1]

IX.

When advised of the intention of the Attorney General to make a filing with the Maricopa County Court constituting an attempted appearance on behalf of the White Mountain Apache Tribe, counsel for the Tribe advised the Attorney General's representative that the Superior Court of Maricopa County *did not* have jurisdiction of the White Mountain Apache Tribe or of its invaluable rights to the use of water to the Salt River and its

---

[1] By an Order dated January 24, 1980, Presiding Judge Stanley Z. Goodfarb, in the Superior Court of Maricopa County, State of Arizona, declared:

> "1. That all captioned pleadings in this matter shall hereafter be designated as set forth in Section 45-252 (D), A.R.S., 'In Re the General Adjudication of all Rights to use water in the Salt River System and Source above Granite Reef Dam, excluding the Verde River Tributary.' "

In this Complaint, the proceeding in the Superior Court of Maricopa County will be referred to as the "Restricted Adjudication of a Segment of the Salt River, W-1."

Proceedings "In Re: General Adjudication Of The Rights To Use Water In The Salt River Watershed Above Granite Reef Dam, Excluding The Verde River Tributary," W-1, *et seq.* At page 19 of the transcript for the February 23, 1981 hearing in these proceedings, Judge Goodfarb directed this statement to counsel for the White Mountain Apache Tribe, who had *not* made an appearance:

> "I think that I will give you until June the 1st to determine whether or not you want to run those risks, but you and I are going to clearly understand that if you make that choice your clients and you will live with that choice." [lns. 8-12]

Continuing at page 20 of the transcript, the Court declared:

> ". . . by June 1, 1981, the United States for and on behalf of those agencies, beneficiaries and others and all such beneficiaries or agencies who want to appear by their own representation other than through the Department of Justice, United States of America, shall file a ***notice of appearance***." [lns. 11-15] [emphasis supplied]

tributaries. The Attorney General's representative concurred with counsel for the White Mountain Apache Tribe that the Superior Court of Maricopa County did not have jurisdiction of the Tribe's rights in the proceedings in question.

X.

Irrespective of the acknowledged lack of jurisdiction of the Superior Court of Maricopa County, State of Arizona, over the White Mountain Apache Tribe or its invaluable rights to the use of water in the Salt River and its tributaries, the Attorney General, in clear violation of that officer's authority, will attempt, unless restrained by this Court, to make an appearance on behalf of the White Mountain Apache Tribe in the "Restricted Adjudication of a Segment of the Salt River, W-1."

XI.

Repeatedly, the White Mountain Apache Tribe, by resolution and explicit communications, has advised the Secretary of Interior and the Attorney General, the principal agents of the Trustee United States of America, that under no circumstances should those officials act in a manner that could in any way violate, abridge, diminish, exchange or modify the Tribe's invaluable rights to the use of water in the Salt River and its tributaries. There is attached to this Complaint and made a part of it by reference Appendix A-1, Resolution No. 79-36, adopted February 13, 1979, by the White Mountain Apache Tribal Council, directing the officials of the Secretary of Interior to refrain from engaging in ". . . all negotiation processes. . . ." involving the Tribe's rights to the use of water in the Salt River and its tributaries. There is likewise incorporated into this Complaint and made a part of it to the same extent and with the same effect as if set forth herein in full Resolution No. 79-188, adopted by the Tribal Council on October 10, 1979, which, among other things, declares that:

". . . the Tribe does not authorize nor consent to its inclusion in the current Secretarial considerations on Central Arizona Project allocations. . . ." [Appendix A-2, p. 67a]

XII.

With specific reference to the "Restricted Adjudication of a Segment of the Salt River, W-1," the Tribe adopted Resolution No. 80-29 on February 7, 1980, in which the Tribe recited that, due to conflicts of interest, the Secretary of Interior and the Department of Justice could not properly represent the White Mountain Apache Tribe and specifically declared as follows:

"BE IT FURTHER RESOLVED that the White Mountain Apache Tribe does not authorize any representative of the Tribe to make an appearance for or on behalf of the Tribe in the on-going State proceedings to adjudicate its rights to the use of water in Salt River and its tributaries, now pending in the Maricopa County Court . . . or in any other State Court.

"BE IT FURTHER RESOLVED that the Tribal Council directs that under no circumstances shall the Department of Justice attempt to appear *on behalf of the White Mountain Apache Tribe in the aforesaid State adjudication involved* [*in*] *the Tribe's rights to the use of water.*" [Appendix A-3, p. 70a] [emphasis supplied]

Resolution No. 80-29 is Appendix A-3 of this Complaint and is incorporated herein to the same extent and with the same effect as if set forth herein in full.

XIII.

By a letter dated November 9, 1979, from Ronnie Lupe, Chairman of the White Mountain Apache Tribe, to the then Secretary of Interior Cecil D. Andrus, the Tribe reiterated and reaffirmed its policy to protect and pre-

serve its water rights in the Salt River and its tributaries and denied that the Secretary of Interior has the power and authority to negotiate in connection with those rights to the use of water. Emphasized there is the unconscionable conflict of interest that pervades all aspects of the activities of the Secretary of the Interior on the Salt River. Stressed in the November 9, 1979 letter is the fact that the Salt River Valley Water Users' Association, which initiated the "Restricted Adjudication of a Segment of the Salt River, W-1," is the agent of the Secretary of Interior, who administers the Salt River Federal Reclamation Project, which has consistently sought to violate the rights to the use of water of the White Mountain Apache Tribe in the Salt River and its tributaries. That letter dated November 9, 1979, is Appendix B to this Complaint and is incorporated into this Complaint by reference and made a part of it to the same extent and with the same effect as if set forth herein in full. There is likewise attached to this Complaint and made a part of it by reference Appendix C, which is a copy of a letter dated January 14, 1980 from Chairman Ronnie Lupe to the then Secretary of the Interior Cecil D. Andrus, in which there is reviewed in explicit detail the repeated attacks by the Secretary of Interior and his staff upon the rights to the use of water of the White Mountain Apache Tribe underscoring the conflict of interest that pervades the activities of the Secretary of Interior.

XIV.

In responding to the Tribe's letters demanding protection and preservation of its rights to the use of water in the Salt River and the threat to those rights by reason of on-going negotiations conducted by the Secretary of the Interior and the prospect of litigation involving those rights, the Secretary of Interior, in a letter dated January 14, 1980, (Appendix D) among other things, declared:

> "At the outset, I want to make clear the Department's position that, to date, *the White Mountain Apache Tribe's Winters doctrine water rights remain unadjudicated and unaffected by any judicial decree now in effect on the Salt River watershed.* Moreover, it is our position that neither the authorization of the Salt River Project (SRP) nor the CAP [Central Arizona Federal Reclamation Project] compromise the Tribe's *Winter's* rights." [Appendix D, pp. 85a-86a] [emphasis supplied]

Manifestly, the Tribe's rights are free from state court jurisdiction. It is unconscionable that the Attorney General would now act to submit the rights of the White Mountain Apache Tribe to state jurisdiction, causing the Tribe irreparable and continuing damage. There is likewise attached to this Complaint and marked Exhibit E a letter dated February 6, 1980, from Ronnie Lupe, Chairman of the White Mountain Apache Tribe, to the then Secretary of Interior Cecil D. Andrus, in which the conflict of interest that pervades all aspects of Secretarial conduct respecting Indian affairs is underscored and fully supported by the Tribe.

XV.

It is of extreme importance to the White Mountain Apache Tribe and it is respectfully urged to this Court that the recognition by the Secretary of the Interior of the undiminished *Winters Doctrine* rights to the use of water in the Salt River and its tributaries underscores the immense value of the Tribe's rights and the need to protect and preserve those invaluable rights. As a consequence, the threat, stemming from the Attorney General's insistence that the Tribe will be subverted to the jurisdiction of the State Court of Arizona, prompts action on the part of the Tribe to protect the rights to the use of water in the Salt River and its tributaries.

XVI.

The nature and magnitude of the genuine, actual and irreconcilable conflict between the White Mountain Apache Tribe and the Attorney General and Secretary of Interior is fully evidenced by the extended and detailed exchange of correspondence on the subject among the Tribe, the Attorney General, the Secretary of Interior and the Solicitor of the Interior Department, the principal law officer of the Department of Interior. There is incorporated into this Complaint and made a part of it to the same extent and with the same effect as if set forth herein in full the critical exchanges between those officers and the Tribe. Stressed here is the fact that at no time is it suggested that the Superior Court of Maricopa County, in the "Restricted Adjudication of a Segment of the Salt River, W-1," has jurisdiction over the Tribe or over the Tribe's invaluable rights to the use of water in the Salt River and its tributaries.[2]

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[2] APPENDIX F: Letter of April 24, 1980, from Ronnie Lupe, Chairman of the White Mountain Apache Tribe, to the then Attorney General Benjamin R. Civiletti, emphasizing the irreconcilable conflicts pervading all of the activities of the Secretary of Interior and the Attorney General in regard to the Tribe's rights to the use of water in the Salt River and its tributaries.

APPENDIX G: Response to Chairman Lupe's April 24, 1980 l[illegible]r, by a letter dated May 15, 1980, from a representative of the Department of Justice. Noteworthy is the fact that the Justice Department's letter acknowledges that "There is some question whether the present case is such a proper proceeding."

APPENDIX H: Letter of May 28, 1980, from Ronnie Lupe, Chairman of the White Mountain Apache Tribe, to the then Attorney General Benjamin R. Civiletti, in which the Tribe reiter-

XVII.

On May 11, 1981, having been advised that the Attorney General would make an appearance against the Tribe's will in the "Restricted Adjudication of a Segment of the Salt River, W-1," the Tribe, acting through Chair-

---

ates and reaffirms its position "'. . . that we will vigorously resist any effort on the part of the Department of Justice to represent us in the Federal Court, the State Court, or any Federal or State administrative tribunal involving our rights in the Salt River and its tributaries.'"

APPENDIX I: Letter dated July 15, 1980, from Clyde O. Martz, the then Solicitor of the Department of Interior, to Ronnie Lupe, Chairman of the White Mountain Apache Tribe, requesting a meeting with the Tribal Council.

APPENDIX J: Letter of August 27, 1980, from Ronnie Lupe, Chairman of the White Mountain Apache Tribe, to the then Solicitor Clyde O. Martz, summarizing the consequences of the meeting requested by the Solicitor with the Department of Interior. Reviewed there is the fact that the Secretary of Interior, managing the Salt River Federal Reclamation Project and the Central Arizona Federal Reclamation Project, constitutes the greatest threat to the White Mountain Apache Tribe. Thus it is the United States is represented by the Secretary of Interior and the Attorney General, who are most likely to violate the rights and interests of the Tribe. Also emphasized in the August 27, 1980 letter is the fact that: "Congress did not authorize the joinder of the United States by the Attorney General in proceedings other than those which can be categorized as 'general adjudications' of a stream system." Clear is the fact that the "Restricted Adjudication of a Segment of the Salt River, W-1," does not constitute a "general adjudication" in any sense.

[Footnote continued on page 39a]

man Lupe, advised the Assistant Attorney General, Land & Natural Resources Division, by mailgram, as follows:

> "I am informally advised it is the intention of the Department of Justice (DOJ), on or before June 1, 1981, to file a pleading with Maricopa County Court

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[2] [Continued]

APPENDIX K: Letter of August 27, 1980, from Ronnie Lupe, Chairman of the White Mountain Apache Tribe, to Senator Barry Goldwater, outlining the threat to the White Mountain Apache Tribe "relative to the efforts of the Department of Justice to bring the White Mountain Apache Tribe into the Salt River adjudication." There, the Tribe reviewed in explicit detail its immunity from suit and the grave threat stemming from an attempted appearance in the Superior Court of Maricopa County by the Attorney General in the truncated and restricted proceedings, referred to here as the "Restricted Adjudication of a Segment of the Salt River, W-1."

APPENDIX L: Letter dated November 25, 1980, from a representative of the Department of Justice to Senator Barry Goldwater, in which these crucial statements are made:

> "Hence, *if* this adjudication of the Salt River watershed is a general adjudication, then the United States is a proper party and the Maricopa County Court does have jurisdiction to adjudicate all the rights of the United States in the watershed, both those it owns as a proprietor, and those it holds in trust for the Indian tribes.
>
> "However, we have not conceded that the present action is now a general adjudication. First, we have grave doubts that the adjudication is sufficiently comprehensive, both geographically and as to the interests in water sought to be adjudicated, to be categorized as a general adjudication within the terms of the McCarran Amendment." [emphasis original]

advising that DOJ, as agent for United States Trustee, will file a claim for reserved water rights for the White Mountain Apache Tribe.

"The White Mountain Apache Tribe denies that Maricopa County Court has jurisdiction. We strenuously urge that the Attorney General, under those circumstances, is without power, authority or sound reason in law or in fact to advise Maricopa County Court that filing will be made.

"Further, we are informed that the Department of the Interior has not requested DOJ to make filing with Maricopa County Court, as proposed.

"Urgently request DOJ refrain from any filing until you have discussed the matter fully with Tribal Counsel William H. Veeder. Request you hold conference with Veeder on Monday, May 18, 1981, at 10:00 a.m.

"Request early response."

Agents Of Trustee Violate Their Obligations To The Tribe

XVIII.

The Attorney General and Interior Secretary are principal agents of the trustee for the Tribe. It is their obligation to preserve and protect the Tribe's rights in the Salt River and its tributaries.

XIX.

The Attorney General and Interior Secretary are required to act for the Tribe with the highest degree of care, skill and diligence. The Interior Secretary, frequently acting in concert with the Attorney General, has violated the trust obligation owing to the White Mountain Apace Tribe.

XX.

Repeatedly, the Interior Secretary, acting with his agent, the Water Users' Association, has undertaken to diminish, limit and denigrate the Tribe's rights in the Salt River and its tributaries. The Attorney General's efforts to subject the Tribe's rights to the jurisdiction of the Superior Court of Maricopa County threatens the Tribe with irreparable and continuing damage. An appearance by the Attorney General in the "Restricted Adjudication of a Segment of Salt River, W-1" would encumber for all time the Tribe's invaluable water rights in the Salt River and its tributaries.

XXI.

It is an imperative necessity that the Tribe be granted a preliminary injunction against the Attorney General, awaiting the ultimate disposition of the question of the Attorney General's power and authority under the circumstances to appear for and on behalf of the Tribe and subject the Tribe to the jurisdiction of the Superior Court of Maricopa County in the "Restricted Adjudication of a Segment of the Salt River, W-1."

ALL-PERVASIVE CONFLICTS OF INTEREST OF ATTORNEY GENERAL PRECLUDE THAT OFFICER FROM PROPERLY FILING AN APPEARANCE ON BEHALF OF WHITE MOUNTAIN APACHE TRIBE, AS THREATENED

XXII.

Principal adverse claimant to the waters of the Salt River and its tributaries to the Tribe's prior, superior and paramount rights to the use of water is the Salt River Federal Reclamation Project constructed by and operated, by contract, by the Secretary of the Interior. Simultaneously, the Secretary of Interior purports to represent the White Mountain Apache Tribe as trustee

with the obligation of protecting, preserving, conserving and utilizing for the benefit of the Tribe the invaluable rights to the use of water in the Salt River and its tributaries, the full equitable title to which resides with the Tribe.

XXIII.

It is impossible to perceive a more patent conflict of interest than that of the Secretary of Interior, who purports to protect the rights and interests of both the Salt River Federal Reclamation Project and the White Mountain Apache Tribe in their adverse claims to the drastically short supply of water in the Salt River and its tributaries.

XXIV.

It is the primary obligation of the Attorney General to represent the Secretary of Interior in any litigation involving the rights to the use of water in the Salt River and its tributaries in which the United States holds an interest. It is abundantly manifest that the Attorney General of the United States cannot properly represent the sharply conflicting rights that exist between the Salt River Federal Reclamation Project and the White Mountain Apache Tribe.

XXV.

The Attorney General of the United States likewise purports to represent the Forest Service, Department of Agriculture; the Bureau of Land Management, Department of Interior; the Fish & Wildlife Service, Department of Interior; and other federal agencies, all of which are claiming adversely to the prior, paramount and superior rights of the White Mountain Apache Tribe.

XXVI.

Plate No. 3, "Restricted Adjudication of a Segment of the Salt River, W-1," following page 56a *infra*, displays the Indian reservations downstream from the Fort Apache Indian Reservation in the Salt River drainage: Fort McDowell, Salt River, Gila River and San Carlos

Indian Reservations. By reason of the fact that the surface and groundwaters of the Salt River are claimed by the respective Tribes, it is obvious that there is serious potential conflict among the Indian Tribes themselves. Additionally, the Secretary of Interior is claiming water rights in the Salt River for the Salt River and Central Arizona Federal Reclamation Projects and other projects. All of those claims are adverse to the rights, titles and interests of the White Mountain Apache Tribe in and to the surface and groundwaters of the Salt River. It is a travesty of justice for the Attorney General to assume the responsibility to represent the White Mountain Apache Tribe in the "Restricted Adjudication of a Segment of the Salt River, W-1," when every act of that officer is impregnated with conflicts of interest due to the disparate and irreconcilable conflicts among the numerous Tribes and agencies asserting claims to the drastically short supply of the surface and groundwaters of the Salt River and its tributaries.

XXVII.

A Corrupt History: The Salt River Federal Reclamation Project

The Salt River Federal Reclamation Project was constructed by the Bureau of Reclamation under the direction of the Secretary of Interior. Underscoring the correct, fundamental and unyielding refusal of the White Mountain Apache Tribe to permit itself to be represented by the Attorney General, whose principal client is the Secretary of Interior, is a Congressional appraisal of the conduct of the Bureau of Reclamation respecting the Salt River Project. Specifically, there is condemned the conduct of that agency and the Secretary of Interior relating to the Arizona Indians, including the White Mountain Apache Tribe:

> "The Indian interests have been most outrageously intermingled with the affairs of the Reclamation

> Service; consequently, the appropriations and uses of the waters of the Salt and Gila Rivers formed the bases of the investigation." [3]

Continuing, the Report declares:

> "The business transactions of the Reclamation Service generally in Arizona have been conducted in the twilight zone. If actual fraud does not exist, it can at least be said that many of the badges of fraud are evident in these transactions." [4]

XXVIII.

In seeking to forestall representation by the Attorney General, who seeks to impose upon the Tribe that officer's unwanted representation, the Tribe is prepared to prove, predicated upon in-depth research, that the Bureaus of Reclamation and Indian Affairs, acting in concert, being sister agencies of the Interior Department, have frequently in the past and are now seeking to denigrate the prior, superior and paramount rights to the use of water in the Salt River and its tributaries of the White Mountain Apache Tribe, for the benefit and use of the existing Salt River Federal Reclamation Project and the now abuilding Central Arizona Federal Reclamation Project. In these proceedings, the Attorney General will, of course, represent those two agencies, which have vigorously attacked the water rights of the Tribe, all as the Tribe will prove if afforded the opportunity. Under the circumstances, it is manifest beyond successful challenge that every act of the Attorney General, in the pending proceeding in the Superior Court of Maricopa County, is impregnated with conflicts of interest. For the Attorney General to force upon the

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[3] Report in the Matter of the Investigation of the Salt and Gila Rivers—Reservations and Reclamation Service, 62d Cong., 3d Sess., Report No. 1506, House Calendar No. 390, House of Representatives, Feb. 11, 1913, p. 3.

[4] *Ibid.*, at p. 17.

Tribe his rejected representation can only result in irreparable and continuing damage to the Tribe and its invaluable rights in the Salt River and its tributaries. Let it again be emphasized that the Attorney General's representatives concur with the Tribe that the Superior Court of Maricopa County, in the proceeding in question, does not have jurisdiction. Hence, the proposed appearance by the Attorney General is entirely improper and should be prohibited.

XXIX.

At all times since its organization in 1903, the Salt River Valley Water Users' Association, hereafter referred to as the Water Users' Association, has dominated and dictated the courses of conduct of the successive Secretaries of Interior and the Attorneys General relative to the Salt River Project. Indeed, the government operations by the Water Users' Association is reviewed in explicit detail by the Congressional Report cited above.[5] In depriving the Gila River Indians of their rights, that Report makes these statements:

> "Kibbey [Attorney for the Water Users' Association] who took a prominent part in drawing the contract, acknowledged before us that no white man would sign such a contract. No Indian did. [Interior Secretary] Garfield signed for them. For the privilege of being thus swindled the Indians had taken from them, of the money appropriated by Congress for irrigation, $100,000, and thus are to date the only persons who have paid one cent on the construction of the Salt River project."[6]

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[5] See, p. 43a at notes 3 and 4, *supra*.

[6] Report in the Matter of the Investigation of the Salt and Gila Rivers—Reservations and Reclamation Service, at p. 10.

XXX.

Morals have not changed in the last three-quarters of a century. Robbing the Indians of their rights to the use of water in the Salt and Gila Rivers is ongoing.

XXXI.

There was filed on April 26, 1974, a "Petition To Determine Conflicting Water Rights," by the Water Users' Association. That proceeding has been referred to as the "Restricted Adjudication of a Segment of the Salt River, W-1." A copy of the Petition is attached and marked Exhibit M. Recited there, among other things, is that the Water Users' Association

> ". . . by agreement with the United States of America is charged with the duty of and is engaged in the delivery of water to all of the land having a valid water right situated within the Salt River Reservoir District." [Appendix M, p. 136a]

XXXII.

In clear error, the Water Users' Association, agent of the Secretary of Interior, asserts that all of the rights to the use of water in the Salt River and its tributaries have been appropriated. That statement is grossly incorrect. The water rights, title to which resides in the White Mountain Apache Tribe, have *not* been appropriated. Rather, the title continues to reside in the White Mountain Apache Tribe.

XXXIII.

Ronnie Lupe, Chairman of the White Mountain Apache Tribe, confronted with an action instituted against the Tribe by the Water Users' Association, an agent of the Secretary of Interior, to adjudicate some, but far from all, of the rights to the use of water in the Salt River and its Tributaries, submitted to the Superior Court

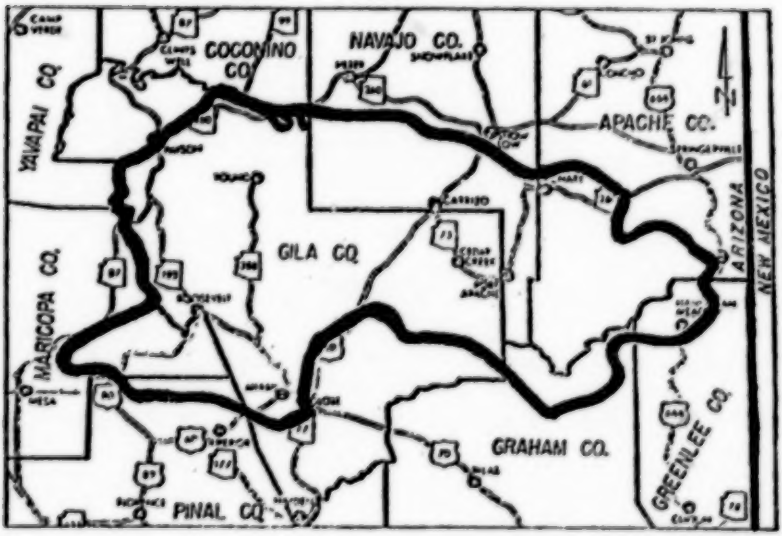
of Maricopa County "solely for the purpose of comity" a suggestion of interest bringing to that Court's attention that the White Mountain Apache Tribe, while not subject to its jurisdiction, held rights to the use of water in the Salt River and its tributaries. Emphasized in that suggestion of interest submitted to the Superior Court of Maricopa County is the fact that the Attorney General is not empowered to represent the Tribe in the pending proceedings, which were initiated by an agent of the Secretary of Interior. That suggestion of interest is marked Exhibit N, attached to and made a part of this Complaint by reference to the same extent and with the same effect as if set forth herein in full. Submitted to the Superior Court of Maricopa County as part of the Tribe's suggestion of interest, without submitting to jurisdiction, was a copy of Appendix A-3 to this Complaint, Resolution No. 80-29, adopted February 7, 1980, by the White Mountain Apache Tribal Council. In that Resolution, the Tribal Council directs ". . . that under no circumstances shall the Department of Justice attempt to appear on behalf of the White Mountain Apache Tribe. . . ." in the proceedings initiated by the Water Users' Association. Also accompanying the Tribe's suggestion of interest was a copy of Appendix F to this Complaint, a letter dated April 24, 1980, from Chairman Lupe to the then Attorney General Benjamin R. Civiletti,

XXXIV.

The truncated and extremely limited proceeding initiated by the Water Users' Association is graphically displayed in Plate No. 2, set forth below.

PLATE NO. 2

SALT RIVER AND ITS TRIBUTARY WATERSHED



ARIZONA STATE LAND DEPARTMENT

XXXV.

It will be observed that Plate No. 2 was disseminated by the Water Users' Association, seeking to represent that the Salt River watershed was in fact included in the proposed litigation. By contrasting the truncated and constricted area set forth in Plate No. 2 with Tribe's Plate No. 1 (at page 27a above) it will be seen that only a fraction of the area involved in the Salt River drainage system has been included in the "Restricted Adjudication of a Segment of the Salt River, W-1." As stated by a representative of the Attorney General:

> ". . . we have grave doubts that the adjudication is sufficiently comprehensive, both geographically and as to the interests in water sought to be adjudicated. . . ." to come within the purview of the McCarran Amendment. [Appendix L, p. 127a] [emphasis added]

XXXVI.

Conflicts of Interest Of The Attorney General—Conclusively Established By Kent Decree

As recited in the Petition filed by the Water Users' Association, Appendix M to this Complaint, at paragraph II, there was entered on March 1, 1910, the *Kent Decree*, which emanated from the proceedings in the then Territorial Court, now the Superior Court of Maricopa County, the case of *Patrick T. Hurley, Plaintiff, the United States of America, Intervenor, Against Charles F. Abbott and Four Thousand Eight Hundred Others, Defendants.*

XXXVII.

By the *Kent Decree*, the Department of Justice has stipulated that there has been an adjudication of some, but far from all, of the rights to the use of *surface* water—groundwater is excluded—from the Salt River *below* Granite Reef Dam. Appendix O is a partial copy of the *Kent Decree.* (See Location Map at page 27a, *supra.*)

XXXVIII.

Acknowledgment by the Secretary of the Interior that the rights to the use of water in the Salt River and its tributaries of the White Mountain Apache Tribe ". . . remain unadjudicated and are unaffected by any judicial decree now in effect on the Salt River watershed. . . ." is of transcendent importance to the White Mountain Apache Tribe.[7] The Tribe and its rights are not subject to the *Kent Decree.* No effort was made by the Justice Department to assert the *Winters Doctrine* Rights for the Salt River Indian Tribe or the Fort McDowell Indian Tribe, who are referred to in the *Kent Decree.*

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[7] Appendix D, p. 85a; see, pp. 34a-35a at para. XIV, *supra*; Appendix O, p. 161a.

In that connection, reference is made to the fact that the United States Court of Appeals for the Ninth Circuit had enunciated the principles of the *Winters Doctrine* in the case of *Winters v. United States* in the year 1906,[8] which was four (4) years antecedent to the entry of the 1910 *Kent Decree*. Moreover, the Supreme Court, in its *Winters* decision (207 U.S. 564, 1908), confirmed the concepts of the *Winters Doctrine* two (2) years prior to the time that the *Kent Decree* was entered. The *Winters Doctrine* protects the rights, titles, and interests of the Indians in and to waters in sufficient quantity to protect their present and future development. The Department of Justice did not in the *Kent Decree*, assert or undertake to establish those rights for the Tribe—a manifest dereliction by the Trustee.

XXXIX.

Fortunately for the White Mountain Apache Tribe, there was no effort on the part of the Department of Justice to appear in *Hurley v. Abbott* on its behalf. However, the present effort to impose upon the White Mountain Apache Tribe the representation of the Attorney General can result in the *Kent Decree* being forced upon the White Mountain Apache Tribe and, in that manner, diminish, abridge and denigrate the *Winters Doctrine* rights to the use of water of the White Mountain Apache Tribe for the benefit of the Salt River Federal Reclamation Project. As stated, that project is administered on behalf of the Secretary of Interior by the Water Users' Association, Petitioner in the "Restricted Adjudication of a Segment of the Salt River, W-1."

XL.

The deficiencies of the *Kent Decree* are all inclusive. None of the elements of a general adjudication are there present. It establishes in decretal form the dominance of

[8] 143 F. 40 (CA 9, 1906); 207 U.S. 564 (1908).

the Salt River Valley Water Users' Association over the activities of the National Government. The *Kent Decree*, among other things, provides:

> "An association of land owners known as the Salt River Valley Water Users Association was formed, comprising nearly all the owners of the land lying on the north side of the river embraced in this suit, capable of irrigation, and the owners of a majority of all the land lying on the south side of the river. * * * By contracts between the Government and the members of the water users association, the latter will be entitled to receive for their land their proportionate share of the surplus water that may be stored by the Government in its impounding reservoir. Those not in the association will have no contractual rights with the Government with respect to the water thus impounded." [9]

That dominance of the Government, which constructed the project, is again well demonstrated by a proviso to the effect that:

> "By agreement entered into between the United States and the Water Users Association, the members of the latter . . . are to be entitled to the benefits of the stored water in Roosevelt reservoir, in such extent of acreage as the project shall serve." [10]

XLI.

Short shrift was given to Indian claims by the *Kent Decree*. Under no circumstances can the White Mountain Apache Tribe be considered as included in the *Kent Decree*. As stated above, the Attorney General did not but should have asserted full *Winters Doctrine* claims

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[9] See, Appendix O, p. 157a.

[10] *Ibid.*, at p. 159a.

on behalf of the Salt River and Fort McDowell Tribes. The Attorney General, there confronted with conflicting interests, supported the non-Indians against the Indians.[11] Under no circumstances should the White Mountain Apache Tribe be subjected to the grossly inequitable and, it is believed, illegal concepts of the *Kent Decree*.

XLII.

Additionally, rights to the use of the groundwater are not included in the *Kent Decree*. That in itself strips the *Decree* of value. Under existing circumstances, virtually all the water now derived below Granite Reef Dam is by pumps. It is not an overstatement to declare that, due to mismanagement of the groundwater table under Phoenix and its environs, the White Mountain Apache Tribe, if forced to release water down into that area, would, in effect, be releasing it into a bottomless pit.

XLIII.

Moreover, the Verde River water rights were not included in the *Kent Decree*. Similarly, they are not included in the truncated "Restricted Adjudication of a Segment of the Salt River, W-1." It is, of course, elemental, with minor exceptions, that the White Mountain Apache Tribe is entitled to priorities over all users on the Salt River. Thus it is that the intentional exclusion by the Water Users' Association of the Verde watershed from the "Restricted Adjudication of a Segment of the Salt River, W-1" was for the purpose of giving benefit to the non-Indian users in that large area. It would likewise give an extreme benefit to the Water Users' Association, whose interests are necessarily far junior to those of the White Mountain Apache Tribe.

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[11] *Ibid.*, at pp. 161a, *et seq.*

XLIV.

Obviously, both the *Kent Decree* and the "Restricted Adjudication of a Segment of the Salt River, W-1" were intended to confirm the long-term, monopolistic operations of the Water Users' Association.

XLV.

It would be grossly inequitable to permit the Attorney General to be a conduit for the seizure of the Tribe's rights.

XLVI.

United States v. Haggard, et al.

Haggard is an action brought by the Justice Department in regard to lands downstream on the Salt River from the limited area where the *Kent Decree* is operative. (See, Plate 3, at page 57a) In the Decree entered in 1913, the Justice Department obtained state appropriative rights for the Indians there involved. Although the concepts of the *Winters Doctrine* were then well known in the Justice Department, they were not asserted in *Haggard.*

XLVII.

Benson-Allison Decree

Another adjudication in the Maricopa County Court involving Indian rights to the use of water in the Salt River is the 1917 *Benson-Allison Decree.* That Decree is downstream from the *Kent Decree* area. The Indians there involved were not awarded *Winters Doctrine* rights, although by the year 1917 the Doctrine was well established.

XLVIII.

Arbitrary And Capricious Action On The Part Of The Department Of Justice

It is free from doubt that the insistence on the part of the Department of Justice that the White Mountain Apache Tribe be forced into the legal jungle involving the downstream rights on the Salt River is a clear-cut, intentional violation by a principal agent of the trustee. There can be no doubt that the activities of the Attorney General, acting through the Department of Justice in this matter, are prompted by political expediency for non-Indians who would greatly benefit by controlling and subjecting the invaluable rights to the use of water of the White Mountain Apache Tribe to their own use.

CONGRESS DID NOT [12]—COULD NOT CONSTITUTIONALLY—SUBVERT WHITE MOUNTAIN APACHE TRIBE'S INVALUABLE RIGHTS IN THE SALT RIVER AND ITS TRIBUTARIES TO STATE CONTROL, AS IS BEING ATTEMPTED BY THE ATTORNEY GENERAL

XLIX.

Waiver Of Immunity, If Constitutional, Limited To "General Adjudications"—Not The Truncated "Restricted Adjudication of a Segment of the Salt River, W-1," Sometimes Hereafter Referred To As "Restricted Adjudication . . . W-1"

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[12] 43 U.S.C. 666. *"Suits for adjudication of water rights—Joinder of United States as defendant; costs*

"(a) Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by ex-

Congress, by 43 U.S.C. 666, waived sovereign immunity of the United States in cases involving ". . . a *general* adjudication of 'all of the rights of various owners on a given stream.' " [13] The Water Users' Association's "Restricted Adjudication of a Segment of the Salt River, W-1" is not an "adjudication of rights to the use of water of a river system or other source." [14] Rather, it is limited to a small portion of the Salt River System.

L.

Congress did not intend to delegate its authority as Trustee for the United States to the several states to administer Indian rights. Rather, by 43 U.S.C. 666, the United States, as "a necessary party," could be joined in "a general adjudication," *inter sese*, of all "rights to the use of water of a river system or other source" [15]— not a restricted adjudication.

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change, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: *Provided*, That no judgment for costs shall be entered against the United States in any such suit.

"*Service of summons*

"(b) Summons or other process in any such suit shall be served upon the Attorney General or his designated representative.

"*Joinder in suits involving uses of interstate streams by State*

"(c) Nothing in this section shall be construed as authorizing the joinder of the United States in any suit or controversy in the Supreme Court of the United States involving the right of States to the use of the water of any interstate stream."

[13] Dugan v. Rank, 372 U.S. 609, 618 (1963). [original emphasis]

[14] 43 U.S.C. 666.

[15] Dugan v. Rank, 372 U.S. 609, 618 (1963).

LI.

From the face of the Petition filed by the Water Users' Association [16]—agent for the Secretary of Interior and historically operating in conjunction with that officer—it is manifest that the Water Users' Association did not initiate a "general adjudication" in its constricted, truncated and limited suit. Rather, that action is directed solely at the White Mountain Apache Tribe with the objective of seizing, limiting, abridging, violating and subverting to state control and jurisdiction the invaluable and life-sustaining rights to the use of water in the Salt River and its tributaries, title to which resides in the Tribe.

LII.

In the Petition of the Water Users' Association, filed seven (7) years ago, the Water Users' Association sought not an adjudication of a "river system or other source," but rather to have

> ". . . The Determination Of Conflicting Rights To The Use Of Water From The Salt River
>
> [a] *Above Granite Reef Dam* And Its Tributaries, Including Tonto Creek,
>
> [b] *Excluding The Verde River And Its Tributaries.*" [17]

LIII.

Plate No. 3, set forth at page 57a of this Complaint, is entitled "Restricted Adjudication of a Segment of the Salt River, W-1." That map demonstrates conclusively that the "Restricted Adjudication . . . W-1" is not subject to 43 U.S.C. 666, the McCarran Amendment, which proves the validity of the "grave doubts" of the Attorney General respecting "W-1." (Appendix L, p. 127a)

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[16] See, Appendix M.

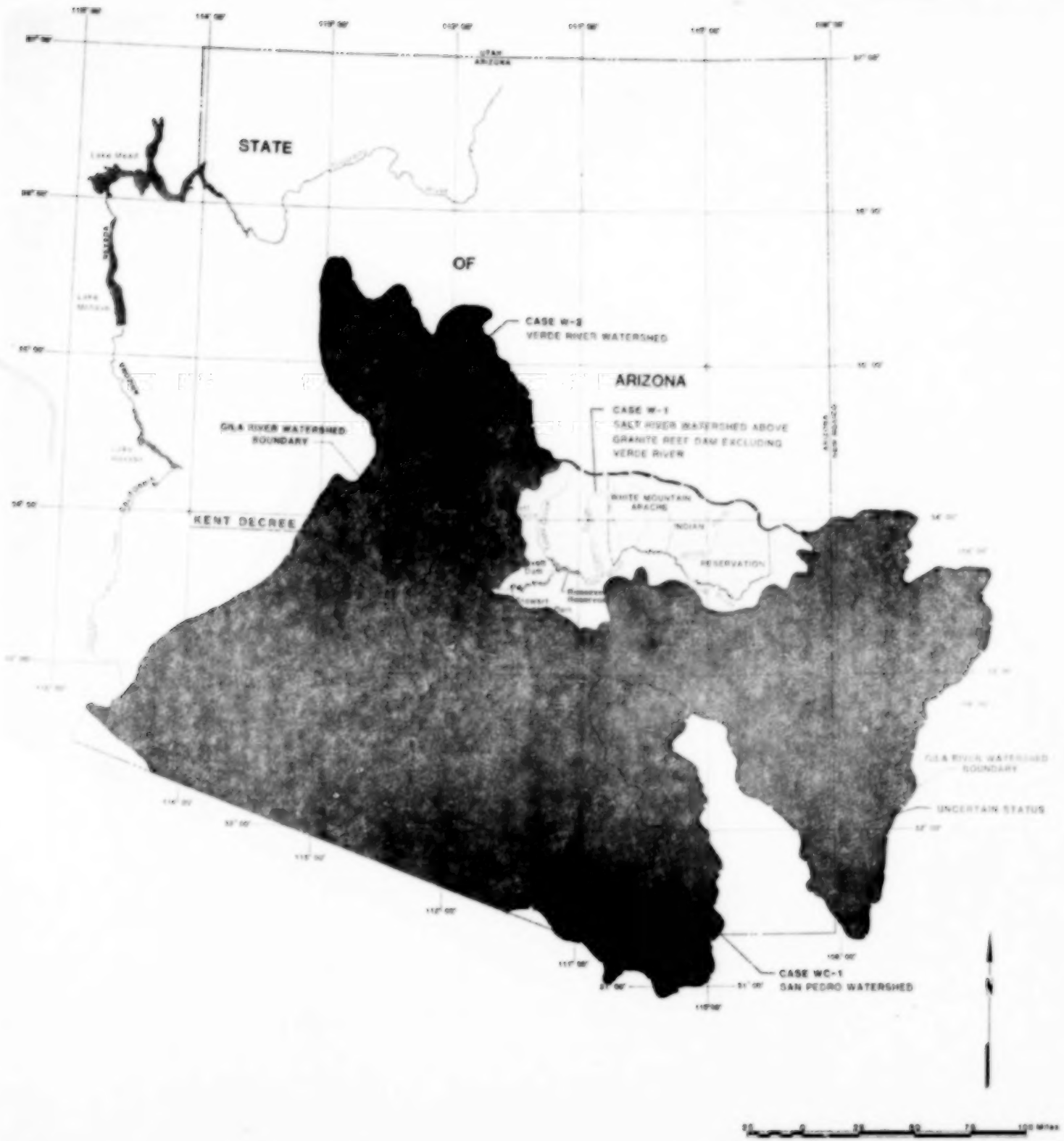
[17] See, Appendix M. [emphasis supplied]

LIV.

Source of the Salt River, as alleged above, is the Fort Apache Indian Reservation. It is, of course, the purpose of the Association, the Attorney General and the Secretary of Interior to impose upon the White Mountain Apache Tribe the *Kent Decree* with the severe limitations upon Indian rights, all as pleaded above. Additionally, it is manifest that, by excluding the Verde River, which was excluded from the *Kent Decree*, the White Mountain Apache Tribe would not receive the benefits of the waters of the Verde River for downstream users, although the White Mountain Apache Tribe, with minor exceptions, holds prior, superior and paramount rights to all of the claims on the Verde River. Thus it is that the Water Users' Association has tailored the truncated "Restricted Adjudication of a Segment of the Salt River, W-1" in a manner that would greatly benefit the Water Users' Association and the Secretary of Interior in the development and administration of the Salt River Federal Reclamation Project and the Central Arizona Federal Reclamation Project.

LV.

The gross and unconscionable manipulation of the proceedings to adjudicate piecemeal and by segments the rights to the use of the surface and groundwaters of the Salt River presents to the White Mountain Apache Tribe far more than continuing and irreparable damage. Rather, the Tribe is confronted with and is prepared to prove that the manipulations of proceedings respecting the Salt River and its tributaries can effectively eliminate the White Mountain Apache Tribe as a distinct and independent people in a maze of contradictory and unmanageable proceedings of the character clearly displayed and depicted on Plate No. 3, at page 57a *supra*. The Tribe is prepared to prove and will prove that the manipulation of proceedings to adjudicate rights to the use of water is a device frequently utilized in the seizing,



IN THE MATTER OF THE DETERMINATION OF THE CONFLICTING RIGHTS TO THE USE OF WATER OF THE SALT RIVER ABOVE GRANITE REEF DAM AND TRIBUTARIES INCLUDING TONTO CREEK, EXCLUDING THE VERDE RIVER AND TRIBUTARIES REFERRED TO IN THIS COMPLAINT. W-1

IN THE MATTER OF THE DETERMINATION OF THE CONFLICTING RIGHTS TO THE USE OF WATER FROM THE VERDE RIVER AND ITS TRIBUTARIES INCLUDING OAK CREEK, BEAVER CREEK, WEST CLEAR CREEK AND EAST VERDE RIVER. W-2

IN THE MATTER OF THE DETERMINATION OF CONFLICTING RIGHTS TO THE USE OF WATER FROM THE SAN PEDRO RIVER AND THE TRIBUTARIES OF THE SAN PEDRO RIVER, INCLUDING ARAVAIPA CREEK. WC-1

RESTRICTED ADJUDICATION OF A SEGMENT OF THE SALT RIVER, W-1

PLATE NO. 3

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diminishing, abridging and violating the rights to the use of water of Indian Tribes, including but not limited to the White Mountain Apache Tribe.

LVI.

The White Mountain Apache Tribe is prepared to proved the allegations in this verified Complaint that there has been a consistent policy, to inhibit, suppress and limit the exercise by the Tribe of its rights to the use of water in the Salt River and its tributaries in furtherance of the Salt River Federal Reclamation Project and other federal projects, adhered to by the successive Secretaries of Interior, acting in concert with the Attorney General and the Water Users' Association, to the irreparable and continuing damage of the White Mountain Apache Tribe. It is further alleged by the White Mountain Apache Tribe that the attempt by the Attorney General to force that officer's unwanted representation in the "Restricted Adjudication of a Segment of the Salt River, W-1" is fully in keeping with the long-time policy of the successive Attorneys General and Secretaries of Interior, acting in furtherance of and for the benefit of non-Indian federal projects and uses.

LVII.

The White Mountain Apache Tribe has consistently and at all times resisted and continues to resist any and all attempts by the Water Users' Association to submit the Tribe's rights to the use of water to the "Restricted Adjudication . . . W-1," to which this Complaint pertains.[18]

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[18] On March 7, 1979, the White Mountain Apache Tribe removed the proceedings to the United States District Court for the State of Arizona. There, the Tribe moved to dismiss on jurisdictional grounds. In denying the Tribe's Motion and remanding the matter to the state court, the United States District Court for the State of Arizona, among other things, said this:

LVIII.

Congress Could Not Constitutionally Subject The Rights To The Use Of Water Of The White Mountain Apache Tribe To The Confiscatory "Restricted Adjudication . . . W-1"; Could Not Constitutionally Subject The Tribe's Rights To State Administration Or To The Practices and Procedures Adhered To In The "Restricted Adjudication . . . W-1"

To subject the rights to the use of water of the White Mountain Apache Tribe in the Salt River and the tribu-

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"The McCarran Amendment applies to the adjudication and administration of 'rights to the use of water of a river system or other source.' "

Ignored by the District Court is the basic fact, which is emphasized here, that the "Restricted Adjudication of a Segment of the Salt River, W-1" does not come within the purview of 43 U.S.C. 666, referred to as the McCarran Amendment.

Proceeding in error, the United States District Court for Arizona said this:

"The State proceedings encompass all water appropriable under State and Federal Law. Whether these causes remain in this Court for determination or are left for determination in the State courts, the applicable law will be the same."

The Court then added this:

"Those rights which are State created will be determined by State law and Federal law will be applied to determine those rights which derive from Federal law."

This non sequitur follows:

"It is difficult, therefore, to imagine how the State proceedings could be considered as anything less than a general adjudication of water rights." Matter of Determination of Conflicting Rights, 484 F.Supp. 778, 784 (U.S.D.C. D. Az. 1980).

Under no circumstances can a "general adjudication" be defined in the manner set forth in the quoted excerpts. Rather, as stated, the term "general adjudication" is *sui generis* and not governed by rights stemming from federal or state law.

taries of that stream to the "Restricted Adjudication . . . W-1" is tantamount to confiscating the Tribe's rights to the use of water. The Attorney General is an adversary of the White Mountain Apache Tribe, not its advocate. Conflicts of interest preclude the Attorney General from acting for the Tribe respecting its rights to the use of water in the Salt River and its tributaries.

LIX.

To permit the Attorney General to appear on behalf of the Tribe in the "Restricted Adjudication . . . W-1" will subject the Tribe to the Attorney General's policy of restricting the Tribe's *Winters Doctrine* rights by imposing limitations upon those rights as advocated by the Attorney General and his staff. The Tribe is prepared to prove the antagonistic and adversary policies adhered to by the Attorney General in litigation involving Indian rights to the use of water. An appearance in the state court would, moreover, strip from the Tribe safeguards essential to the preservation of its rights. Those safeguards include Constitutional and statutory guarantees for the benefit of the Indians; the Federal Rules of Civil Procedure respecting pleadings, practices, and procedures; the Federal Rules of Evidence; the right of cross-examination; and other federally established principles.

LX.

An appearance by the Attorney General in the "Restricted Adjudication . . . W-1" would encumber for all time the invaluable rights to the use of water of the White Mountain Apache Tribe in the Salt River and its tributaries.

LXI.

The proceedings in question effectively deny the Tribe's Constitutional, civil, and human rights to be heard in a court created and functioning pursuant to the Consti-

tution and laws of the United States of America, the trustee for the White Mountain Apache Tribe.

WHEREFORE, THE WHITE MOUNTAIN APACHE TRIBE RESPECTFULLY PRAYS THIS COURT:

1. To enjoin, restrain, and prohibit the Attorney General and all members of that officer's staff and the Secretary of the Interior and all members of that officer's staff from taking action of any kind which could result in the rights to the use of water of the White Mountain Apache Tribe in the Salt River and its tributaries being subjected to the jurisdiction, laws, statutes, or the Constitution of the State of Arizona, or to subject in any way those rights of the White Mountain Apache Tribe to the jurisdiction, courts, tribunals, agencies, or personnel of the State of Arizona.

2. To enjoin, restrain, and prohibit the Attorney General and all members of that officer's staff and the Secretary of the Interior and all members of that officer's staff from acting to negotiate, sell, diminish, dispose of, lease, exchange, or in any way encumber (including, but not limited to appearance in the county, administrative tribunals or agencies, state or federal) the rights to the use of the water of the White Mountain Apache Tribe in the Salt River and its tributaries.

3. To enjoin, restrain, and prohibit the Attorney General and all members of that officer's staff and the Secretary of the Interior and all members of that officer's staff from making any general appearance or special appearance on behalf of the White Mountain Apache Tribe in the proceedings entitled "In Re the General Adjudication of all Rights to use water in the Salt River System and Source above Granite Reef Dam, excluding the Verde River Tributary" or in any other proceeding

in any court or tribunal, federal or state, involving the Tribe's rights in the Salt River and its tributaries.

4. To adjudge, declare, and determine that neither the Attorney General and members of that officer's staff nor the Secretary of the Interior and members of that officer's staff is empowered pursuant to the provisions of 43 U.S.C. 666 (sometimes referred to as the McCarran Amendment) or by any other act of Congress or by reason of any explicit or implicit power residing in those officials in the Executive Branch of the Government to appear or to represent that they will appear or file any pleading or motion or document of any kind on behalf of the White Mountain Apache Tribe in the Superior Court of Maricopa County in the proceedings entitled "In Re the General Adjudication of all Rights to use water in the Salt River System and Source above Granite Reef Dam, excluding the Verde River Tributary"; and

5. For such other relief as would be proper and appropriate under the circumstances.

21 May 1981

Respectfully submitted,

/s/ William H. Veeder
WILLIAM H. VEEDER
White Mountain Apache Tribe

Suite 920
818 18th Street, N.W.
Washington, D.C. 20006

[202] 466-3890

APPENDIX A-1

Resolution No. 79-36

RESOLUTION OF THE
WHITE MOUNTAIN APACHE TRIBE OF THE
FORT APACHE INDIAN RESERVATION

WHEREAS, the Tribal Council of the White Mountain Apache Tribe is responsible for protecting all natural resources of the White Mountain Apache Tribe, and

WHEREAS, tribal water resources are an integral part of the very existence and future of the White Mountain Apache people, and

WHEREAS, the United States Government, through the Secretary of the Interior and his representatives has a critical legal responsibility to the Tribe, as its trustee, to protect and defend the Tribe's water resources, and

WHEREAS, the Tribe, officials of the Interior Department, and other tribal officials had heretofore initiated a factfinding stage of negotiations to settle non-Indian claims to tribal water resources, and

WHEREAS, the Tribal Council has fully considered and finds that proceeding any further into a negotiation process with non-Indian water claimants does not presently serve the best interests of the White Mountain Apache Tribe in fully and fairly protecting its water resources.

BE IT RESOLVED by the Tribal Council of the White Mountain Apache Tribe that it hereby directs the federal trustee of the tribe, acting through the Bureau of Indian Affairs, the Solicitor's Office or any other Interior Department representatives to cease any and all negotiation processes on behalf of

the White Mountain Apache Tribe regarding adverse claims to water resources of the White Mountain Apache Tribe.

BE IT FURTHER RESOLVED by the Tribal Council of the White Mountain Apache Tribe that it hereby requests that all such further actions necessary to protect the water resources of the White Mountain Apache Tribe be taken by the Federal trustee, or its representatives, in the best interests of the White Mountain Apache people and with continued full consultation with the Tribe.

The foregoing resolution was on February 13, 1979 duly adopted by a vote of 9 for and 0 against by the Tribal Council of the White Mountain Apache Tribe, pursuant to authority vested in it by Article V, Section 1 (f) and (i) of the Amended Constitution and By-Laws of the Tribe, ratified by the Tribe June 27, 1958 and approved by the Secretary of the Interior on May 29, 1958, pursuant to Section 16 of the Act of June 18, 1934 (48 Stat. 984).

/s/ Ronnie Lupe
Chairman of the Tribal Council

/s/ Mary C. Endfield
Secretary of the Tribal Council

APPENDIX A-2

Resolution No. 79-188

RESOLUTION OF THE
WHITE MOUNTAIN APACHE TRIBE OF THE
FORT APACHE INDIAN RESERVATION

WHEREAS, the Tribal Council of the White Mountain Apache Tribe is fully advised and aware that the Secretary of the Department of the Interior is currently considering water allocations from the Central Arizona Project, including possible reallocation of waters therefrom to central Arizona Indian Tribes, and

WHEREAS, the Tribal Council has been advised that the Bureau of Indian Affairs is instructed to undertake an environmental impact assessment for the purpose of such Secretarial reallocation decisions, and

WHEREAS, the Tribal Council has been presented with, and had reviewed, the "work plan" for such assessment by the Bureau of Indian Affairs, including the compiliation of existing data or information relating to "water needs" on the Fort Apache Indian Reservation, and

WHEREAS, the Tribal Council is aware, from various meetings and correspondence with Bureau of Indian Affairs and Interior officials, that it is the intention of the Department of the Interior to use Central Arizona Project allocations, or reallocations, to Indian Tribes, for the purpose of proceeding with negotiated settlements of Indian Water Rights in Arizona, and

WHEREAS, the Tribal Council enacted Resolution No. 79-36, establishing that it shall not presently negotiate the water rights of the White Mountain Apache Tribe, and that it does not authorize or consent to

the United States, or anyone acting on its behalf, to negotiate water rights of the Tribe, and

WHEREAS, the Tribal Council finds that neither the basis nor the scope of the planned environmental impact assessment hereinabove referenced serve the interests or the legal posture of the Tribe, but rather constitute actions against these interests, and

WHEREAS, the Tribal Council of the White Mountain Apache Tribe finds that it is not in the best interests of the Tribe for it to be involved in the Central Arizona Project reallocation process, or the environmental impact assessment related thereto.

BE IT RESOLVED by the Tribal Council of the White Mountain Apache Tribe that the Tribe does not authorize nor consent to its inclusion in the current Secretarial considerations on Central Arizona Project allocations and the Bureau of Indian Affairs environmental impact assessments related thereto.

BE IT FURTHER RESOLVED that the Tribal Council directs that no agency of the Tribe, or anyone acting on behalf of the Tribe, deliver any information concerning the Tribe and its water rights, to anyone, without the express written consent of the Tribe, through its legal department.

BE IT FURTHER RESOLVED that the Tribal Council expressly reaffirms that it shall not subject the water rights of the White Mountain Apache Tribe to negotiated settlement, or any processes in contemplation thereof.

The foregoing resolution was on October 10, 1979 duly adopted by a vote of 10 for and ZERO against by the Tribal Council of the White Mountain Apache Tribe, pursuant to authority vested in it by Article V, Section 1 (i) & (f) of the Amended Constitution and By-Laws of the Tribe, ratified by the Tribe June 27, 1958

and approved by the Secretary of the Interior on May 29, 1958, pursuant to Section 16 of the Act of June 18, 1934 (48 Stat. 984).

/s/ Ronnie Lupe
Chairman of the Tribal Council

/s/ Mary C. Endfield
Secretary of the Tribal Council

APPENDIX A-3

Resolution No. 80-29

RESOLUTION OF THE WHITE MOUNTAIN APACHE TRIBE OF THE FORT APACHE INDIAN RESERVATION

WHEREAS, the White Mountain Apache Tribe is of the opinion that the Secretary of the Interior has such gross conflicts of interest that it is improper for him to act for and on behalf of the Salt River Water Users Association, the claims in the Salt River of which are diametrically opposed to the Tribe's interests in that river and it is outside of the law for the Secretary simultaneously to act for both the Tribe and the Salt River Water Users Association, which administers the Salt River Reclamation Project, by reason of those conflicts of interest, and

WHEREAS, the White Mountain Apache Tribe, in keeping with its intention not to negotiate away its water rights, is also opposed to acknowledging that the State Court has jurisdiction over the Tribe's rights in the Salt River and its tributaries, and will not appear in the State Court proceedings entitled, Salt River Water Users Association vs. White Mountain Apache Tribe in the Maricopa County Court, or in any other State Court, and

WHEREAS, the White Mountain Apache Tribe denies that the United States of America could properly represent the Tribe in the above-mentioned Salt River adjudication proceedings in the Maricopa County Court and will take every action requisite to prevent the United States of America acting through the Secretary of the Interior and the Department of Justice, if the Department of Justice seeks to represent the Tribe in those proceedings in opposition to the will of the Tribe.

BE IT RESOLVED by the Tribal Council of the White Mountain Apache Tribe that it directs the Tribal Chairman to fully advise the Secretary of the Interior in person, that under no circumstances is the Secretary to proceed with negotiations which will in any way involve the rights of the use of water of the White Mountain Apache Tribe in and to the water of the Salt River and its tributaries.

BE IT FURTHER RESOLVED that the White Mountain Apache Tribe does not authorize any representative of the Tribe to make an appearance for or on behalf of the Tribe in the on-going State proceedings to adjudicate its rights to the use of water in Salt River and its tributaries, now pending in the Maricopa County Court entitled *Salt River Water Users Association vs. White Mountain Apache Tribe*, or in any other State Court.

BE IT FURTHER RESOLVED that the Tribal Council directs that under no circumstances shall the Department of Justice attempt to appear on behalf of the White Mountain Apache Tribe in the aforesaid State adjudication involved the Tribe's rights to the use of water.

BE IT FURTHER RESOLVED that the Tribal Council directs that the Secretary of the Interior, by reason of the aforesaid conflicts of interest which permeate all of his activities, shall refrain from taking any action in litigation, negotiations or any other activities that could in any way affect the Tribe's rights to use of water in the Salt River and its tributaries.

The foregoing resolution was on February 07, 1980 duly adopted by a vote of 10 for and 0 against by the Tribal Council of the White Mountain Apache Tribe, pursuant to authority vested in it by Article V, Section 1 (i & f) of the Amended Constitution and By-Laws of the Tribe,

ratified by the Tribe June 27, 1958 and approved by the Secretary of the Interior on May 29, 1958, pursuant to Section 16 of the Act of June 18, 1934 (48 Stat. 984).

/s/ Ronnie Lupe
Chairman of the Tribal Council

/s/ Mary C. Endfield
Secretary of the Tribal Council

APPENDIX B

Executive Office of the Chairman
WHITE MOUNTAIN APACHE TRIBE

RONNIE LUPE
Chairman

November 9, 1979

The Honorable Secretary, Cecil D. Andrus
Department of the Interior
C Street Between 18th and 19th Streets, N.W.
Room 6151
Washington, D.C. 20240

Dear Mr. Secretary:

I am herein responding on behalf of the White Mountain Apache Tribe to your statement of October 5, 1979, which was made to the representatives of the Congress, non-Indian water users, and some Indian Tribes respecting the Central Arizona Project. In connection with those statements, I am advised that the Bureau of Reclamation would determine the water requirements for the Fort Apache Indian Reservation, using data supplied to it by the Bureau of Indian Affairs. Additionally, it is understood that you are sponsoring plans and participating in these plans pursuant to which the Salt River Valley Water Users Association and several Indian Tribes purportedly are to settle their claimed rights to the use of water in the Salt River and its tributaries. As you are aware, the White Mountain Apache Tribe has rejected the proposal to negotiate its rights with the Water Users Association, or with anyone else.

There is attached to this letter and made a part of it by reference Resolution No. 79-36 dated February 13, 1979, adopted by the Tribal Council by which the Tribe declared its unwillingness to negotiate its rights. The Tribe has made it abundantly clear that it does *not*

intend to settle its rights in any manner with the Salt River Valley Water Users Association.

The White Mountain Apache Tribe holds prior and paramount rights to the use of water in the Salt River and its tributaries. Moreover, it is of extreme importance, that two-thirds of all of the waters in the Salt River which reach the Granite Reef Diversion Dam, arise upon, border, traverse, or underlies the Fort Apache Indian Reservation. By reason of that fact, the Tribe is asserting full equitable title to rights in the Salt River and its tributaries, the legal title to which is in the United States as trustee. The interest of the trustee should be strictly for the purpose of *protecting* the Tribe's rights against invasions of the character that has been repeatedly attempted by the Salt River Valley Water Users Association.

It is the position of the White Mountain Apache Tribe that any agreement to settle rights in the Salt River would necessarily involve the rights and interests of the Tribe because, as stated above, a large proportion of all the water in the Salt River system is directly and immediately related to the Fort Apache Indian Reservation.

The plans of the Salt River Valley Water Users Association to negotiate settlements with the Tribes occupying the reservations on the Salt River in the vicinity of Phoenix involve the White Mountain Apache Tribe's rights. This threat to the Tribe becomes acute in view of your statement that implementing legislation is to be obtained from the Congress of the United States, approving the negotiated settlements entered into with the Salt River Valley Water Users Association. For that reason, the Tribe hereby strenuously opposes any such settlement agreements of the nature to which reference is made above. There can be no settlements, as has been emphasized, involving the water of the Salt River that would not have an *adverse* affect upon the rights of the White Mountain Apache Tribe.

Moreover, in the negotiation process that you sponsor, it has been ignored that the Salt River Valley Water Users Association has repeatedly attempted to limit, diminish, or abrogate the rights of the Tribe in the Salt River and its tributaries. It is a matter of record that the Water Users Association has attempted to enlarge the Kent Decree, which emanated from the case of Hurley vs. Abbott, to include the rights of the White Mountain Apache Tribe. Although the Water Users Association was unsuccessful in that attempt, it is clear beyond question that the Water Users Association will seek, in any way possible, including its present negotiations, to adversely affect the Tribe's interest in the Salt River.

It is also a matter of record that in 1969, the Bureau of Indian Affairs negotiated an abortive settlement with the Salt River Valley Water Users Association which was rejected by the Tribe and thereby became a nullity. In February, 1979, the Water Users Association initiated an adjudication suit against the White Mountain Apache Tribe involving the rights to the use of water which would likewise be involved in any negotiated settlement that the Water Users Association would attempt with other Tribes. Thus, it is clear that the negotiations in question would adversely affect the interest of the Tribe in any proceeding now pending before the court or which may hereafter be initiated.

Accordingly, it is the specific request of the White Mountain Apache Tribe that you prevent the Bureau of Reclamation from attempting to determine the water requirements of the White Mountain Apache Tribe in the Salt River and its tributaries. If they are permitted, the results may well be that the Bureau of Reclamation will attempt drastically to limit the Tribe's rights for the benefit of the Salt River Valley Water Users Association which administers the Salt River Federal Reclamation Project. It is impossible to perceive a more all-pervasive conflict of interest than to have the Bureau of Reclama-

tion attempt to determine the Tribe's rights to water and the measure of those rights. Additionally, you are requested to prevent any negotiation by the Salt River Valley Water Users Association that will purport to settle or resolve any rights in the Salt River and its tributaries.

Finally, the White Mountain Apache Indian Tribe makes its clear that the Secretary of the Interior has the obligation to protect the Tribe's rights and that the negotiations being conducted by the Salt River Valley Water Users Association are, in effect, the negotiations which should be participated in by the Secretary of the Interior, whose responsibility in those negotiations is to fully protect the interest of the White Mountain Apache Indian Tribe.

Attached hereto is a memorandum of facts and law to me from tribal Legal Counsel, with respect to the preservation and protection of the White Mountain Apache Indian Tribe's rights in the Salt River and its tributaries. The Tribe has adopted that memorandum as a legal basis for this letter. It is the opinion of the Tribe that a meeting should be held in the very near future with you personally to the end that the Tribe will not be damaged by the ongoing programs to negotiate and settle Indian rights. In particular, the White Mountain Apache Tribe requests that there be no statement in regard to the measure of the Tribe's water rights.

I would appreciate an early reply from you.

Yours truly,

/s/ Ronnie Lupe
RONNIE LUPE
Tribal Chairman
White Mountain Apache Tribe

RL:mjc

cc: The Honorable Forrest Gerard
Assistant Secretary for Indian Affairs
Department of the Interior
Washington, D.C.

Lafollett Butler, Director
Phoenix Area Office
Bureau of Indian Affairs

William H. Veeder, Esq.
Legal Counsel
White Mountain Apache Tribe

Kathleen A. Rihr, Esq.
Tribal Attorney
White Mountain Apache Tribe

APPENDIX C

Executive Office of the Chairman
WHITE MOUNTAIN APACHE TRIBE

RONNIE LUPE
Chairman

14 January 1980

The Honorable Secretary, Cecil D. Andrus
Department of the Interior
C Street Between 18th & 19th Streets, N.W.
Room 6151
Washington, D.C. 20240

SUBJECT: Rejection of the Environmental Characterization Report

Dear Mr. Secretary:

I am writing to you on behalf of the Tribal Council of the White Mountain Apache Tribe, in further reference to my letter dated November 9, 1979, to you. My letter of that date concerns your statement of October 5, 1979, which was directed to the alleged need to have the Indian Tribes negotiate settlements of their rights to the use of water and to the construction of the Central Arizona Federal Reclamation Project, as related to Indian water settlements. Accompanying my letter was a memorandum dated November 1, 1979, reviewing in detail your October 5th statement. In your October speech, you referred to a time schedule for the preparation of data to determine the environmental consequences of allocating an alleged supply of water from the Central Arizona Project to the Indian Tribes. You stated that the collection of information will be completed on November 15, 1979, and that you project the completion of the environmental assessment for January 15, 1980.

I have not received a response nor an acknowledgement from you to my letter of November 9th. However, I received from the Bureau of Indian Affairs, on January 2, 1980, a complex document entitled "Environmental Characterization Report, Indian Reservations Within Gila River Drainage Basin, January 1980." Accompanying that Report was an additional statement entitled "Fort Apache." The Tribe was advised to respond to such characterization report the day after its receipt. My telegram, and more fully this letter, provide such reponse.

Since sending you the telegram of January 4, 1980, I have been able to become fully advised on the BIA "Characterization Report." Because of the time constraints that you have announced, I am presuming that you intend to adopt the Report substantially in the present form and content. I therefore review the Report as yours and regard you as the official with whom the ultimate responsibility must reside.

The "Characterization Report" constitutes a calculated and intentional insult to the White Mountain Apache Tribe. Repeatedly, you single out the White Mountain Apache Tribe to contrast its annual average income per capita with the average annual per capita income statewide in Arizona, and you depict the White Mountain Apache Tribe as being prone to alcoholism, suicide and homicide.

By contrasting these false "social indicators," as well as the average annual income of members of the White Mountain Apache Tribe, you are seeking to establish a predicate that will warrant the seizure of our rights to the use of water for the benefit of the non-Indian community in Phoenix and its environs. You apparently feel that your principal obligation is to the Salt River Federal Reclamation Project, which you administer, and to the Central Arizona Federal Reclamation Project, the construction of which is now under your direction.

Seemingly, I must remind you that you are the principal agent of the United States, Trustee, obligated to preserve and protect, not confiscate, the White Mountain Apache Tribe's rights to the use of water in the Salt River and its tributaries. Your obligation, as Trustee for the White Mountain Apache Tribe, requires you to meet the most exacting fiduciary standards. Yet, you do not exercise the discretion to perform your obligation with care, skill and diligence for the purpose of protecting the Tribe's rights. Rather, your activities and the Report, to which I refer, are shrouded in the most flagrant conflict of interest within the Office of the Secretary, which precludes you from performing in the manner that the law requires of you in regard to these crucial issues during these crucial times. You consider your principal obligation to be to the land and water speculators, who occupy the service area of the Salt River Federal Reclamation Project and who occupy the service area of the Central Arizona Federal Reclamation Project, assuming that it is ultimately constructed. That they could profit handsomely from the seizure of the rights to the use of water of the White Mountain Apache Tribe is indisputable.

You, in effect, declare that the measure of the rights of my Tribe to use the waters of the Salt River must be limited to provide water for the benefit of the downstream non-Indian reclamation projects that you administer. I must necessarily challenge your authority under those circumstances to seek to limit the rights of my Tribe and further declare that the course you have adopted is unconscionable.

Seizure of the Tribe's rights to the use of water would have an immediately destructive effect. It precludes all future planning for economic development. If our use of water is limited, the continuance of tribal existence is gravely imperiled. Genocide will be the ultimate result if

the plans now fostered for the federal reclamation projects, to which reference has been made, are effectuated.

Every effort is made in the "Characterization Report" to create a false image of the White Mountain Apache Tribe. Poverty, says the Report, is all pervasive. High unemployment, it says, is the rule. "Trauma," the Report insists, is a major cause of death. Failure exudes all aspects of the "Characterization Report." To achieve that end, the Report grossly misrepresents the facts respecting the achievements of the White Mountain Apache Tribe. Rather than a true statement reflecting the magnificent success of the White Mountain Apache Tribe in the management of its timber resources, the Report states that the Tribe has been "attempting" to develop the timber industry and that a "tribal sawmill" is utilized to process the forest produce.

If you do not know, you should know that the White Mountain Apache Tribe operates one of the most efficient, productive and profitable timber enterprises in the United States. That timber industry, described as a "sawmill," had a gross income in excess of $20 million last year. Every type and kind of skilled position in the lumber industry developed by the Tribe is being filled by Apache Indians—hardly evidence of the degenerate, alcoholic, suicidal, homicidal people which are depicted in the "Characterization Report."

Continuing in its effort to represent that the Tribe does not need to exercise its rights to the use of water but, rather, should have those rights diminished, the Report makes repeated, inaccurate or misleading statements. For example, the "Characterization Report" states that "Currently available soils studies and land classifications are very incomplete." As the Bureau of Indian Affairs must know, the Tribe has now completed intensive and thorough soil surveys and land classification studies on the Fort Apache Indian Reservation. Those studies and classifications comply fully with national standards.

The Tribe is now in a position to prove that there are 46,000 irrigable acres of land with a water requirement of approximately 200,000 acre-feet of water. Thus it is gravely in error for the "Characterization Report" to declare that the information available to the Bureau of Indian Affiars would ". . . indicate up to 15,000 acres of irrigable land."

Having misrepresented the facts as to irrigable acreage and water requirements, the "Characterization Report" makes this additional false statement:

> "*Ft. Apache Scenario.* The possible development for White Mountain Indian Community will not significantly improve social indicators. Projected increases in income and employment are not enough to alter the long-term social indicator trends."

Following such fallacious statements, that agricultural development would not significantly improve the standard of living on the White Mountain Apache Indian Reservation, these projections are made in the Report:

> "This income, when combined with 1.5 million dollars from tribal leases could increase the per capita

	1980	Intermediate Development	Ultimate Development
Per Capita Income	$2,300	$2,500	$2,600

> income from $2,300 in 1979 to $2,[illegible]00 by 1980. The increase of $300 per person, or about $1,200 per family, will not significantly improve the tribe's income in comparison with Arizona's per capita income of $7,400."

By false representation of fallacious concepts, predicated upon inaccurate assessments of irrigable acreage, you are saying that the use of water for agricultural purposes would not benefit the Tribe. Simple facts prove this to be erroneous.

The Canyon Day Irrigation Project, now being constructed by the White Mountain Apache Tribe will produce alfalfa hay at $50 per ton. Presently, the members of the Tribe, who must purchase alfalfa from outside of the Reservation, are paying $85 per ton. It does not take a social scientist, who can create the "Ft. Apache Scenario" or the "Income Scenarios," to understand that, if the livestock industry on the Reservation can obtain an adequate supply of hay for the winter months at a reasonable price, the entire White Mountain Apache Indian Community will greatly benefit.

Present plans by the White Mountain Apache Tribe are to develop a water resources program pursuant to which thousands of acres of land will be irrigated by the Tribe in the full and legal exercise of its invaluable rights to the use of water in the Salt River and its tributaries. Those plans, of course, cause consternation to the land and water grafters who have in the past and now plan on making huge profits off of the sale of land by representing that those lands are entitled to water, the legal title to which resides in the White Mountain Apache Tribe.

I have considered the "Characterization Report" as it relates to the recently issued "President's Water Policy Implementation 10-Year Plan For Review Of Indian Water Claims" and find the 10-year plan equally adverse to the interests of the Apache Tribe. It is evident that the studied attack upon the White Mountain Apache Tribe, our people, our resources and our rights to the use of water would create trouble for the Tribe when contemplated in light of the strange "socioeconomic inventory" contained in the 10-year plan. The White Mountain Apache Tribe has demonstrated a great depth of wisdom in consistently rejecting any offer by you and your staff to negotiate for the purpose of relinquishing the Tribe's rights to the use of water for the benefit of the federal reclamation projects. That wisdom, on the

part of the Tribe, has permitted us to anticipate, to prepare and to accommodate ourselves to the struggle of preventing you from confiscating our rights to the use of water.

Finally, I reemphasize that, in my November 9, 1979 letter and accompanying memorandum, the history of the Department of Interior policy of stifling irrigation development on the White Mountain Apache Indian Reservation was reviewed. To reverse that policy, the Tribe this summer commenced the Canyon Day Irrigation Project. The staff of the Bureau of Indian Affairs promised, without limitation, that $250,000 would be made available to the Tribe for that project. On November 13, 1979—four days subsequent to the Tribe's reiteration on November 9, 1979, that we would not negotiate away our rights, as you demand—the Tribe was advised that the Bureau of Indian Affairs denied that such funds were available for the project and that they had not been promised. I inform you now that the refusal of funds to the Tribe—if we do not negotiate away our rights—will not succeed. We are dedicated to prevent your seizure of our water rights.

I have the obligation as Chairman of the White Mountain Apache Tribe to request that you refrain from issuing either the Environmental Characterization Report, pertaining to all Tribes, or the portion of that Report that pertains to the White Mountain Apache Tribe. For the reasons expressed above, the data is so inaccurate, so biased and so racist in character that, though it can easily be discredited, it can nevertheless result in irreparable damage to the Tribe if you permit it to circulate.

Additionally, I request to meet with you personally—not with a member of your staff—to discuss in detail the grave threat that you have presented to my Tribe by your course of conduct in regard to the Tribe's invaluable and life-sustaining rights to the use of water in

the Salt River and its tributaries. I desire this meeting with you prior to any action on the Environmental Characterization Report and the Fort Apache Report, to which this letter is directed. I perceive a meeting of this character a fulfillment at least in part of your obligation as the principal agent of the Trustee United States.

It is my sincerest hope that you have been misled by the aggressive bureaucracy that has consistently violated the Indian rights to the use of water in furtherance of reclamation projects and that you will reverse your position in these crucial matters.

Sincerely,

/s/ Ronnie Lupe
Tribal Chairman
White Mountain Apache Tribe

APPENDIX D

UNITED STATES DEPARTMENT
OF THE INTERIOR

[SEAL]

OFFICE OF THE SECRETARY
Washington, D.C. 20240

Jan. 14, 1980

Ronnie Lupe, Chairman
White Mountain Apache Tribe
P.O. Box 1150
Whiteriver, Arizona, 85941

Dear Mr. Lupe:

Thank you for your letter of November 9, 1979, attaching a memorandum dated November 1, 1979, to you from William Veeder concerning the Department's efforts to facilitate negotiated settlements of Indian water rights in central Arizona. Your letter and Mr. Veeder's memorandum contain a number of statements which indicate a misunderstanding of the Department's position about protection and development of tribal water rights, including those of the White Mountain Apache Tribe, and the construction of the Central Arizona Project (CAP). This letter is intended to reassure you of our commitment to see that your Tribe's water rights are protected, and to reiterate the Department's strategy for doing so.

At the outset, I want to make clear the Department's position that, to date, the White Mountain Apache Tribe's *Winters* doctrine water rights remain unadjudicated and are unaffected by any judicial decree now in effect on the Salt River watershed. Moreover, it is our position that neither the authorization of the Salt River Project (SRP) nor the CAP compromised the Tribe's

Winter's rights. However, because the demands for Salt River water far exceed the supply, and growth in the Salt River Valley apparently is continuing unabated, I believe it is incumbent on me as your trustee to assist you in quantifying and developing your water rights in order to protect them from predation from competing non-Indian interests.

Our initiative to secure the Tribe's water rights through a process of negotiation rather than litigation comports with President Carter's water policy. Successful negotiation will result in a settlement that not only confirms the Tribe's water rights, but also provides funds for their development. No one reasonably can disagree that beneficial use of the Tribe's water is sorely needed on the reservation.

Our commitment to negotiation unfortunately is misunderstood by Mr. Veeder; the litigation and administrative actions which the Solicitor has prepared to induce settlement and to which I referred in Phoenix on October 5, are directed not at the Indians, but at the non-Indian water users.

The alternative to negotiation is litigation, which in this situation is certain to be lengthy, costly, risky, and when completed still will require congressional appropriations to develop the adjudicated water. That is why I said in Phoenix, and reiterate now, that we can all appreciate the benefits of trading the certainty of agreement for the uncertainty of litigation.

As you know, our intention is to have each of the central Arizona tribes take a primary role in the negotiations, and I have committed one of my assistants, Eric Jankel, to participate in them as my personal representative. Because neither the Tribe nor I can permit the alienation of your water rights in the negotiations, any agreement that is reached must be confirmed by the Congress. It is beyond question, that without such confirmation, there

can be no settlement. Your concern that an agreement may be made but that Congress will fail to approve it with the result that the tribal water right is lost is unfounded. If Congress fails to approve a settlement, then litigation can proceed both by the Tribe and the United States on your behalf to adjudicate your water rights.

The reason for linking the timing of Indian water rights settlements with the development of the CAP is obvious. CAP represents the only source of uncommitted water available to central Arizona. We prefer settlements which vindicate tribal water rights but are designed to minimize the adverse effects on the present users. Only by considering all water supplies available to central Arizona, both imported and local, are settlements likely. Therefore, I believe it is in the best interests of the central Arizona tribes to coordinate the proposed CAP allocations with Indian water rights settlements.

None of this reasoning suggests, as Mr. Veeder concludes, that somehow the Tribe's water rights have been extinguished and will be replaced by a contingent CAP allocation. Nevertheless, CAP allocations may directly or indirectly affect the White Mountain Reservation and other reservations in central Arizona. Our obligations under the National Environmental Policy Act (NEPA) require that an environmental assessment be made although nothing in the assessment calls for a quantification of tribal water rights, and nothing in our report will so indicate. The Bureau of Indian Affairs is working to compile the data needed for the assessment and would welcome any relevant data the Tribe may wish to supply.

The Department is participating in the negotiations pursuant to its trust responsibility to all the central Arizona tribes. The negotiations between the Salt River Community and the Salt River Project will not be permitted to impair your Tribe's rights on the stream. Any settlement which is presented to Congress between the Project and the Community will be reviewed by this Department to

provide for protecting your rights, although at this point, I do not see how a settlement between them can affect your interests.

Finally, if you remain unwilling to participate in negotiations and prefer to litigate, we will review the situation, and, after consulting with you, will decide on the best course to proceed with litigation on your behalf.

Sincerely,

/s/ Cecil D. Andrus
Secretary

APPENDIX E

Executive Office of the Chairman
WHITE MOUNTAIN APACHE TRIBE

RONNIE LUPE
Chairman

6 February 1980

The Honorable Secretary,
Cecil D. Andrus
Department of the Interior
C Street, Between 18th & 19th
Streets, N.W.
Room 6151
Washington, D.C. 20240

Dear Mr. Secretary:

This is in reply to your letter of January 14, 1980, purportedly in response to my letter of November 9, 1979, and to the Memorandum dated November 1, 1979, respecting the rights to the use of water of the White Mountain Apache Tribe in the Salt River and its tributaries.

I consider your letter totally inadequate. It fails entirely even to make reference to the most crucial issue that I have presented to you for response. That issue is, of course, your gravely divided responsibilities and conflicts of interest as Secretary of Interior. I deny that you can represent the Salt River Valley Water Users' Association, the Salt River Federal Reclamation Project and the Central Arizona Project and, at the same time, adequately represent the White Mountain Apache Tribe. As emphasized to you in the November 1, 1979 Memorandum, which is in support of my letter, there is brought to your attention the basic principles of law which preclude your activities under the circumstances that exist

here. There, it is emphasized that the United States has charged itself with moral obligations to the Indians of the highest responsibility and trust. It is likewise emphasized that, in the performance of those functions on behalf of the Indians, you, as principal agent of the Trustee United States, must meet the most exacting fiduciary standards. You cannot, in my opinion, remain within the law when, as here, you attempt simultaneously to represent our Tribe, the Salt River Federal Reclamation Project, the Central Arizona Federal Reclamation Project, and their constituencies, the interests of which are diametrically opposed to those of my Tribe.

The impossibility of your representing the conflicting interests, to which I have referred, must be remedied. It is clear beyond question that your decisions must, of necessity, be warped by the politically powerful, non-Indian land and water speculators who have profited greatly from the operations of the Salt River Federal Reclamation Project and will similarly profit by the construction and operation of the Central Arizona Project. Your failure to respond to my statements respecting your conflict of interest only aggravates the most serious problem confronting the White Mountain Apache Tribe in the on-going struggle for Salt River water.

You state and I agree that the demands for Salt River water far exceed the supply. You have undertaken as a policy to force upon the Indian Tribes a settlement which, as you express with candor, must necessarily entail the relinquishment by the Tribes of some of their rights to the use of water. I cannot countenance that approach. The rights to the use of water of the White Mountain Apache Tribe are interests in real property which are protected by the Constitution of the United States against divestiture.

Never has your unconscionable conflict of interest been better demonstrated than at the present moment. In the

final paragraph of page two of your letter, you make the grossly erroneous statement that my Tribe's special counsel has concluded that

> ". . . somehow the Tribe's water rights have been extinguished and will be replaced by a contingent CAP allocation."

That statement is wholly fabricated and must be retracted. It is contrary to fact.

In the same paragraph, continuing the false statements respecting the extinguishment of my Tribe's rights, you refer to the "environmental assessment" prepared by your Department. That document is entitled "Environmental Characterization Report, Indian Reservations within Gila River Drainage Basin," with a special report captioned "Fort Apache." In my January 14, 1980 letter to you, I referred to the falsehoods and the racist tone and temper of that Characterization Report. It is clearly a bigoted, anti-Indian summary contrived with the objective of demonstrating that development of my Tribe's rights to the use of water in the Salt River will not materially benefit our members.

I am now advised that the Characterization Report is to be rewritten with the objective of eliminating some of the more libelous attacks upon the White Mountain Apache Indian Tribe. Nonetheless and of extreme importance is this fact: The Report, although revised, will be directed, as was originally intended, to demonstrate that the Tribes should be satisfied to have their rights to the use of water transferred to the "Anglos." Otherwise stated, the data relative to population on our reservation, the per capita income and related information will be utilized to demonstrate that the "Anglos" would benefit more from the waters of the Salt River than will the members of the White Mountain Apache Tribe. In substance, it is intended to change the charges of alcoholism, homicide and suicide, as originally written, into a more mellow dissertation with identically the same ob-

jectives as the original Characterization Report: The White Mountain Apache Indian rights to the use of water in the Salt River and its tributaries, irrespective of the fact that title to those rights to the use of water resides in my Tribe, should be sharply diminished or totally confiscated for the benefit of the downstream, non-Indian users.

To demonstrate your thesis that the rights to the use of water in the Salt River are too valuable for the White Mountain Apache Tribe to retain, the "Environmental Characterization Report" sets forth, under the heading of "Quality Of Life: Social and Economic Indicators," a sharp attack upon the White Mountain Apache Indian as a people, our reservation and our way of life. On the predicate of those fallacious concepts, it is the policy of the Secretary of Interior to maintain the Indians in a welfare state.

The well-orchestrated attack, under the heading to which reference has been made, contains this language:

> "This special relationship [between the United States, Trustee, and the Indians] has a particular consequence for this study. Because of the relationship, indicators for health, education, and housing are likely to improve with or *without development.*" [emphasis supplied]

Continuing, it is stated that:

> "The guaranteed provision of these services are independent impacts, and it is likely that any lack of development action would not affect the overall, long-term improvement of Quality of Life."

With particular reference to the White Mountain Apache Tribe, it is stated that the social indicators will show a decline mostly because of population growth:

> "That is, if Behavioral Health, Health, Education, etc. indicators improve, it will not be because of

> the increase in agricultural and M&I production associated with increased water allocations." [Fort Apache, pg. 7]

Additionally, it is declared in the "Environmental Characterization Report" that the White Mountain Apache Tribe and others:

> ". . . will experience a deterioration in social indicators in spite of the income and employment generated by increased water availability."

I perceive a contradiction in that statement with the earlier declaration that the utilization of water would not benefit the Tribes. Nevertheless, it is clear beyond question that, even if the truth were expressed and common knowledge set forth, you would deny the Indians their rights to the legal entitlements from the Salt River and its tributaries. You point out, in error that:

> "Population growth for these communities is such that project gains in employment and income are smothered by the demands of an increasing labor force."

Quite obviously, it is your purpose to deny the Tribes not only their rights to the use of water but likewise to deny them the opportunity to flourish and to increase with the passing of time.

It is added:

> "Unless income and employment are generated by some other action, objectives indicators on the reservation will deteriorate." [p. 86]

Tone, temper and rationale of the "Environmental Characterization Report" is to obviate or to avoid the principles of law enunciated in the case of *Arizona v. California* when the Highest Court rejected out of hand Arizona's attempt to measure Indian rights to the use of water by Indian population. In rejecting as fallacious identically the same concepts which you advance, the Supreme Court, in the decision last mentioned, said this:

> "[The Master] . . . found that the water was intended to satisfy the future as well as the present needs of the Indian Reservations and ruled that enough water was reserved to irrigate all of the practicably irrigable acreage on the reservation." [373 U.S. 546, 600 (1963)]

As to the concepts to which you adhere in the Characterization Report, the Supreme Court had this to say:

> "Arizona, on the other hand, contends that the quantity of water reserved should be measured by the Indians' 'reasonably foreseeable needs,' which, in fact, means by the number of Indians."

To that specious assertion by Arizona, the Supreme Court stated:

> "How many Indians there will be and what their future uses will be can only be guessed. We have concluded, as did the Master, that the only feasible and fair way by which reserved waters for the reservations can be measured is irrigable acreage." [At p. 601]

I wish also to refer to the fact that the "President's Water Policy Implementation 10-Year Plan For Review Of Indian Water Claims" is likewise permeated with attacks upon the Indians and their so-called "Socioeconomic Inventory," all as set forth in that 10-year plan.

There, it is stated that the purpose of describing the socioeconomic environment of the reservation is mainly to

> ". . . provide information about the fundamental economic relationships that exist between the region and the reservation."

Full meaning of that statement is understood when the "Environmental Characterization Report" is taken into consideration. Otherwise stated, the objective of the 10-year plan is to create a situation that would cause re-

jection of an Indian project strictly on the basis of regional development. Applying those concepts to the White Mountain Apache Tribe, as it relates to the population of Phoenix and its environs, would result in the rejection of any planned development for my Tribe. [See, p. A-19]

In the implementation of the President's Water Policy, as set forth in the 10-year plan, reference is made to economic trends, employment and unemployment, income, housing and related "scenarios." We now know what meaning to ascribe to the language used in the 10-year plan. Thus it is that the "Environmental Characterization Report" was not entirely wasted on the Tribes. Now, we know what to expect under the 10-year plan.

Once again, I wish to refer to the conflict of interest which, I have stated, permeates your every decision respecting the Salt River and its tributaries. Having deliberately insulted the White Mountain Apache Tribe in your "Environmental Characterization Report," you make this diametrically opposed statement in your January 14, 1980 letter:

> ". . . I believe it is incumbent on me as your trustee to assist [the White Mountain Apache Tribe in] . . . developing your water rights in order to protect them from predation from competing non-Indian interests."

I concur with the statement in regard to your obligations to my Tribe but I seriously question your ability to fulfill those obligations in light of your conflict of interest.

In regard to "predation" of my Tribe's rights, Mr. Secretary, I emphasize to you this fact: I know and you know or most assuredly should know that you, as administrator of the Salt River Federal Reclamation Project, constitute the sole and only threat to the rights to the use of water of the Salt River and its tribuaries of the

White Mountain Apache Tribe. It is you who administer that project. You are developing the Central Arizona Federal Reclamation Project, the water deficiency of which constitutes a national scandal in light of the federal expenditures being made. You and you alone can prevent "predation" by the Salt River Valley Water Users' Association, which is your agent to administer the federal reclamation project and the only threat to the rights of my Tribe in the Salt River.

You also state that my Tribe's *Winters Doctrine* rights remain ". . . unaffected by any judicial decree now in effect on the Salt River watershed." Further, you state that ". . . neither the authorization of the Salt River Project (SRP) nor the CAP compromised the Tribe's *Winter's* rights." Again, I agree. Because those rights have not been violated and remain unabridged, I strongly resist the concept that the Salt River Valley Water Users' Association should be permitted to commit Salt River water in a settlement with Indian Tribes below Granite Reef Dam. To do so might very well result in an abridgement or a loss of my Tribe's rights by reason of congressional approval.

It is my view that, unless and until drastic administrative changes are made in the administration of the Salt River waters below Granite Reef Dam, the rights of the White Mountain Apache Tribe will be offered up in sacrifice for the maladministration of the Salt River Federal Reclamation Project.

I call to your attention the July 6, 1979 memorandum from the Field Solicitor, Phoenix, Arizona, to the Associate Solicitor, Division of Indian Affairs. That memorandum is entitled "Litigation Report on *Hurley v. Abbott*, Civil No. C 4564, Water Commissioner's Report Filed June 3, 1967."

The Solicitors Office, with candor and accuracy, points to the fact that the Salt River Valley Water Users' Association, without legal authority, has contracted with

numerous municipalities for the sale of Salt River water. These words by the Field Solicitor warrant careful consideration:

> "As we see it . . . the reclamation laws all support the conclusion that project water delivery, use and regulation are all under the general supervisory authority of the Secretary. . . . the authority of the Secretary remains intact and paramount.
>
> ". . . we suggest that the Secretary should promulgate regulations governing changes in use, nonuse and nonbeneficial use." [See, pp. 19-20]

Because of maladministration of the Salt River Federal Reclamation Project, there exists a state of chaos below Granite Reef Dam. That chaotic state stems from a type of anarchy adhered to by the Salt River Valley Water Users' Association. I submit to you that, until corrective measures are taken to eliminate the maladministration of the surface and groundwaters of the Salt River, any endeavor on your part or by your representatives to undertake an apportionment of those waters constitutes a violation of the rights to the use of water of the White Mountain Apache Tribe. As previously emphasized to you, a very high percentage of all of the waters in the Salt River reaching Granite Reef Dam comes from sources of water which arise upon, traverse, border, or underlie the Fort Apache Indian Reservation. Those lands have been occupied by the White Mountain Apache Tribe since time immemorial.

The Salt River is a bankrupt stream. Claims against it far exceed the available supply. Any effort to make an apportionment of those waters is tantamount to giving a preferred status to a creditor with claims against a bankrupt estate. Rest assured that the White Mountain Apache Tribe holds full equitable title to rights to the use of water from time immemorial of such character and such magnitude that any apportionment of the rights

to the use of water, as you propose, will impair my Tribe's rights.

Under my direction, an intense factual and legal investigation has been made of the entire Salt River stream system. Maladministration of both the surface and groundwaters of that stream buttresses the conclusion of the White Mountain Apache Tribe that we must remain aloof from the on-going program that you are conducting. I have no faith that the State of Arizona can or will take action to remedy the catastrophic mining of the groundwater of the Salt River Valley Groundwater Basin. There has been created, as you know, a bottomless pit into which the Salt River now flows. I cannot agree that my Tribe should relinquish our invaluable rights to the use of water for the purpose of supplying the land and water speculators who have created the chaos in the Salt River Valley.

I have requested a meeting with you—not with members of your staff—for the purpose of bringing forcefully to your attention the greatest threat that has been brought to the Indian Tribes in the Salt River Valley in the past century. Your understanding of the dilemma you have created, which confronts my Tribe, is an imperative necessity.

Sincerely,

/s/ Ronnie Lupe
RONNIE LUPE
Tribal Chairman
White Mountain Apache Tribe

APPENDIX F

Executive Office of the Chairman
WHITE MOUNTAIN APACHE TRIBE

RONNIE LUPE
Chairman

April 24, 1980

The Honorable Benjamin R. Civiletti
Attorney General of the United States
Department of Justice, Room 5116
10th and Pennsylvania, N.W.
Washington, D.C. 20530

Re: *Rights of White Mountain Apache Tribe in the Salt River, State of Arizona*

Dear Mr. Civiletti:

I am advised that a request has been made by a representative of the Land and Natural Resources Division, Department of Justice, to our Special Counsel of the White Mountain Apache Tribe. That request was made for the data now being assembled by the Tribe to defend our invaluable rights to the use of water in the Salt River and its tributaries against adverse claims.

On behalf of the White Mountain Apache Tribe, I reject that request upon the following grounds and for the following reasons:

1. The Department of Justice is the attorney for the Secretary of the Interior. That official is now, and has been for many years, asserting claims in the Salt River and its tributaries which are adverse to our Tribe's right to the use of water in that stream system.

2. The claims of the Secretary are on behalf of the Salt River Federal Reclamation Project, which is now being administered for the Secretary of the Interior by the Salt River Valley Water Users' Association. That agent of the Secretary initiated a proceeding in the

Superior Court of Maricopa County, State of Arizona, to have adjudicated some, but far from all, of the rights to the use of water in the Salt River. It named the White Mountain Apache Tribe as one of the numerous defendants in the proceedings. In substance, the Secretary of the Interior is now proceeding against us to have the Tribe's rights adjudicated in the State proceedings.

3. Quite obviously, the data now being assembled by the White Mountain Apache Tribe to defend its rights, if delivered to the Department of Justice, would in all probability be used against the Tribe in either the ongoing State court litigation, or in other litigation which the Department of Justice might initiate.

4. On February 7, 1980, the Tribal Council of the White Mountain Apache Tribe adopted Resolution No. 80-29. Among other things, that Resolution ". . . directs that under no circumstances shall the Department of Justice attempt to appear on behalf of the White Mountain Apache Tribe . . ." in the State court adjudication initiated by the agent of the Secretary of the Interior. A copy of that resolution is attached for your convenient reference.

It has also been suggested that the Department of Justice might initiate an action in the Federal Court independent of the ongoing State court proceedings to adjudicate the rights to the use of water in the Salt River. As proposed, the Department of Justice would undertake to appear on behalf of the White Mountain Apache Tribe in the proposed proceedings. In either case, the Department of Justice would have the obligation of representing the Secretary of the Interior, whose interests are, as stated, diametrically opposed to and contravene the interests of the White Mountain Apache Tribe in the stream system here involved.

It is literally an impossibility for the White Mountain Apache Tribe properly to be represented by the Department of Justice while that Department is simultaneously

representing the Secretary of the Interior. Irreconcilable conflicts of interest within both the Department of Justice and the Department of the Interior preclude the White Mountain Apache Tribe from permitting either Department to represent us in litigation of the nature to which reference has been made herein.

It is important here to emphasize that the Department of Justice appeared in the case of *Hurley v. Abbott*, from which emerged the Kent Decree. That decree purports to adjudicate some of the rights to the use of water that are exercised in connection with the Salt River Federal Reclamation Project. The White Mountain Apache Tribe was not a party to those proceedings, nor is it bound by the Kent Decree. Quite obviously, there is a high risk that, should the Department of Justice make an appearance in any proceeding involving the Salt River, an effort would be made to bring the Tribe's rights within the purview of the Kent Decree. That would cause irreparable and continuing damage to my Tribe.

I reaffirm the refusal of the White Mountain Apache Tribe to deliver to the Department of Justice the data which it has requested. I likewise reaffirm the position of the White Mountain Apache Tribe that we will vigorously resist any effort on the part of the Department of Justice to represent us in the Federal Court, the State Court, or any Federal or State administrative tribunal involving our rights in the Salt River and its tributaries.

Respectfully,

/s/ Ronnie Lupe
RONNIE LUPE
Tribal Chairman
White Mountain Apache Tribe

RL:sn

cc: Mr. James W. Moorman
Asst. to Attorney General

APPENDIX G

JWMoorman
SSagalkin
MEFlint
SECarroll
90-6-2-47

[SEAL]

UNITED STATES DEPARTMENT OF JUSTICE
ASSISTANT ATTORNEY GENERAL
LAND AND NATURAL RESOURCES DIVISION
Washington, D.C. 20530

May 15, 1980

Mr. Ronnie Lupe, Chairman
White Mountain Apache Tribe
P.O. Box 1150
Whiteriver, Arizona 85941

Dear Chairman Lupe:

This is in response to your thoughtful and courteous letter of April 29, 1980, concerning this Department's request for copies of studies being done to support your tribe's claim to reserved water rights in the Salt River adjudication. We cannot agree with the conclusions stated in your letter but we appreciate the chance to discuss these problems with you, and through you with the tribal council and tribal members.

We agree that the tribal reserved rights to water are invaluable. We therefore, take very seriously our obligation as attorneys for the United States, the trustee, to protect those rights. We have been informed by William H. Veeder, your special counsel, that he has advised you, and you have accepted his advice to ignore the state proceedings, so as not to endanger the tribe's reserved rights.

It is clear that the state or the Salt River Project may not sue the tribe to adjudicate its water rights. *Martinez* v. *Santa Clara Pueblo*, 436 U.S. 39 (1978). However, it it equally clear that the United States may be sued in its capacity as trustee to quantify your tribe's reserved rights. The McCarran Amendment, 43 U.S.C. 666; *Colorado River Water Conservation District* v. *United States*, 424 U.S. 800 (1976). Like it or not, Congress has granted the states the authority to adjudicate Indian water rights in a proper proceeding.

The Supreme Court has also approved this procedure. There is some question whether the present case is such a proper proceeding. The United States will shortly begin the process of litigating that question in state court. However, we deem it essential to begin the process of preparing our claims for eventual filing if we are told by the appropriate courts that the state proceeding is a general adjudication, and that the state courts do have jurisdiction.

If no claim is presented on behalf of your tribe, and if the courts determine that this is a proper proceeding the almost inevitable result will be that your tribe's reserved right will be lost, completely and forever. The United States, as trustee of the *Winters* right, cannot stand by and watch that happen. If the United States were to do so, the whole idea of the trust relationship between the United States and your tribe would be meaningless.

The policy of the United States is to allow the tribes to determine for themselves what their future will be. However, if that policy is pushed to the extreme, the United States could not take any action as trustee unless the tribe approved. The result would be the ending of the trust relationship between the United States and Indian tribes. Only Congress can abrogate the trust relationship. This Department and your tribe cannot do so. Hence, we cannot accede to your request not to make a claim on the tribe's behalf in the state proceedings.

Turning to the specific points in your letter, it is true that the Salt River Project was built according to the provisions of the Reclamation Act of 1902; as amended. However, the water rights of the project are held by the Individual land-owners within the project. Thus, the United States does not claim water rights on behalf of the project or on behalf of individuals within the project.

You contend that there is a conflict of interest which should disable the United States from appearing in the state proceedings on behalf of the tribe. This so-called "conflict" problem stems from a basic misunderstanding of the law. When the United States is sued in an action such as this, it must present all of its claims to water in the watershed. Congress and the Supreme Court have told us that the tribe's *Winters* rights are among those rights which are owned by the United States and which must be presented or forfeited. Hence, this Department does not represent the tribe in these proceedings, but it represents the United States as owner in trust of the *Winters* rights.

As representatives of the United States as trustee, we must inevitably make decisions which will affect your tribe's *Winters* rights. We would prefer to consult with you, your attorneys, and your engineers in making those decisions, so that your concerns may be taken into account. However, if you refuse to cooperate with the United States those decisions will still be made but without your participation.

I hope that the tribe and its attorneys will cooperate with the members of my staff who will be working on this case. If you do not cooperate, our job of securing the White Mountain Apache Tribe's full *Winters* rights will be made more difficult and less certain of success. I will appreciate hearing from you in response to this letter.

Sincerely,

/s/ Sanford Sagalkin
SANFORD SAGALKIN
Deputy Assistant Attorney General
Land and Natural Resources Division

cc: Kathleen A. Rihr, Esquire
Seventh Floor, Luhrs Tower
45 West Jefferson
Phoenix, Arizona 85003

William H. Veeder, Esquire
818 18th Street, N.W.
Suite 920
Washington, D.C. 20006

Frederick N. Ferguson, Esquire
Acting Solicitor
Department of the Interior
Washington, D.C. 20240

APPENDIX H

Executive Office of the Chairman

WHITE MOUNTAIN APACHE TRIBE

May 28, 1980

The Honorable Benjamin R. Civiletti
Attorney General of the United States
Department of Justice, Room 5116
Tenth and Pennsylvania, N.W.
Washington, D.C. 20530

Dear Mr. Civiletti:

This letter is in reference to one received from your Land and Natural Resources Division under date of May 15, 1980. That letter purported to deal with points and issues raised in my letter of April 24th, which was addressed to you. A copy is enclosed for your information.

The May 15th letter from your Land and Natural Resources Division, while addressing some of our concerns and issues obliquely, is clearly written from a perspective that does not closely coincide with the views and obligations of a trustee having the interests of the White Mountain Apache Tribe as its sole (or even primary) consideration. As executive agents of the United States Government, the Departments of Justice and the Interior utterly fail the tests of fiduciaries required under our system of law.

The contents of my letter of April 24, 1980, remain the official position of the White Mountain Apache Tribe. I call your attention to the last sentence in that letter: ". . . that we will vigorously resist any effort on the part of the Department of Justice to represent us in the Federal Court, the State Court, or any Federal or State

administrative tribunal involving our rights in the Salt River and its tributaries."

Respectfully,

/s/ Ronnie Lupe
RONNIE LUPE
Tribal Chairman
White Mountain Apache Tribe

RL:bb

cc: Mr. James W. Moorman
Asst. to Attorney General

APPENDIX I

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
Washington, D.C. 20240

[SEAL]

July 15, 1980

Honorable Ronnie Lupe, Chairman
White Mountain Apache Indian Tribe
Whiteriver, Arizona 85941

Dear Mr. Lupe:

In recent months two issues concerning water for the White Mountain Apache Tribe have arisen: (1) the pendency of the Salt River adjudication in state court, and (2) the imminent allocation of Central Arizona Project water by Secretary Andrus to certain Indian tribes. With respect to the Salt River adjudication, you have taken the position that the Tribe will refuse to be represented by the Department of Justice and will refuse to assist the Department of Justice in preparing a case to present as your trustee. I have read the statement which you filed with the court and understand that the Tribe has reached its conclusion on the basis of specific rather than arbitrary concerns. As I am sure the Council is aware, the potential consequences of this decision are grave for the future of the Tribe. Accordingly, I believe it would be useful for attorneys from this Department together with attorneys from the Department of Justice to meet with your Council and discuss some of the factors that are involved in this decision.

The trust relationship between the United States Government and the White Mountain Apache Tribe is taken very seriously by this Department and the Department

of Justice. Similarly, we respect the right of the White Mountain Apache Tribe to make its own decisions on matters affecting its vital interests. But I believe it is essential that there be a full and frank dialogue and exchange of views before decisions are made irrevocably.

The question of Secretarial allocations of Central Arizona Project water is also of concern to me, and I believe we should take the opportunity to discuss the question with the Council. It seems to me that an allocation of Central Arizona Project water might under some circumstances be beneficial to the Tribe. In all events, I believe it would be worthy of discussion.

Accordingly, I have assigned responsibility to Assistant Solicitor Dan Rosenfelt of my office to contact you and arrange together with the Department of Justice for a meeting with you and your Council. I hope this will be agreeable to you.

Sincerely,

/s/ Clyde O. Martz
Solicitor

cc: Sanford Sagalkin, Esq.

APPENDIX J

Executive Office of the Chairman

WHITE MOUNTAIN APACHE TRIBE

August 27, 1980

Mr. Clyde O. Martz
Solicitor
United States Department of the Interior
Washington, DC 20240

Dear Mr. Martz:

In your letter of July 15, 1980, you suggested that the White Mountain Apache Tribal Council meet with Mr. Rosenfelt of your staff. That meeting was held August 6, 1980. In attendance with Mr. Rosenfelt were Mr. Gaddy, from the Department of Justice, and Mr. Swan of the Field Solicitor's Office, Phoenix, Arizona.

You are of course aware of the background of that August 6 meeting. The White Mountain Apache Tribe has denied that the Attorney General has the power and authority to force the representation of the Department of Justice upon the Tribe in the Salt River litigation, now pending in the Superior Court of Maricopa County. There has been no change in the position of the White Mountain Apache Tribe respecting that litigation.

What emerged from the August 6, 1980 meeting is this: Both the Solicitor's Office and the Department of Justice are of the opinion that the White Mountain Apache Tribe should willingly be represented by the Department of Justice. Yet, they do not—indeed cannot—deny that the Department of Justice is immersed in conflicts of interest. For that reason, the Department of Justice cannot properly or adequately present the claims

of the Tribe in the state court, assuming that the state court has jurisdiction which the White Mountain Apache Tribe denies.

It is manifest to all who have knowledge of the subject that the primary threat to the rights to the use of water of the White Mountain Apache Tribe and the Salt River and its tributaries is the Salt River Federal Reclamation Project. That project was constructed by the Secretary of the Interior and has repeatedly attempted to diminish the vested rights of the Tribe. Additionally, there is now under construction a Central Arizona Federal Reclamation Project. As you know, the Department of the Interior is erroneously asserting rights in the Salt River for that project. Those claims for the reclamation projects must of necessity be adverse to the interests of the Tribe.

No one has satisfactorily answered the charge of conflict of interest within both the Department of Justice and the Solicitor's Office of the Department of the Interior. It is no answer to the Tribe that lawyers in both of these Federal agencies do their best under circumstances which no self-respecting law firm would allow to exist.

It has been suggested that the Salt River Water User's Association will present the claims for the Salt River Federal Reclamation Project. It is no answer to the Tribe that the Salt River Water User's Association will replace the Department of Justice. Whoever presents the claims for the Salt River Federal Reclamation Project will be asserting rights that are diametrically and totally opposed to the rights of the White Mountain Apache Indian Tribe. You may rest assured that the Department of Justice will not—and indeed cannot—assume a position contrary to the lawyers of the Salt River Water User's Association. To do so would be tantamount to the Department of Justice seeking to attack the Kent Decree

which it sponsored and which purportedly adjudicates some, but far from all, of the claims for the Federal reclamation project administered by the Salt River Water User's Association.

At the August 6, 1980 meeting, the Federal lawyers declared that they also represent the National Forest Service, the Fish and Wildlife Service, the Bureau of Land Management, and other agencies whose claims are adverse to the Tribe. Those all-pervasive conflicts of interest within both the Solicitor's Office and the Department of Justice warn the Tribe that the gravest threats to its rights in the Salt River are the Federal Government's non-Indian agencies and the Water User's Association which have contracted with those agencies.

It is the opinion of the White Mountain Apache Tribe that the Salt River adjudication falls far short of coming within the purview of the McCarren Act, 43 U.S.C. 666. That proceeding—in its present status—omits literally thousands of claimants to water from the Salt River System. The Tribe denies that, under those circumstances that either the Attorney General or anyone else has the power to make a "general appearance" in the proceedings as the Department of Justice attempted. Congress did not authorize the joinder of the United States by the Attorney General in proceedings other than those which can be categorized as "general adjudications" of a stream system. Adjudications of that nature result in a determination and declaration inter sese of all rights in a single stream system. I am sure you will agree that the Maricopa County Salt River proceedings do not and cannot be characterized as a general adjudication within the meaning of that term. As the Supreme Court stated in Pacific Livestock Co. v. Oregon Water Board* in regard to "general adjudications": "All claimants are required to appear and prove their claims . . ." in a single stream system. Under no circumstances can the proceed-

* 241 U.S. 440 (1916).

ings in question come within the purview of the definition set forth in the Pacific Livestock Co. decision. I am aware that the Federal District Court took a contrary view. With that view I disagree.

It is understood by statements from Mr. Rosenfelt that the State of Arizona is contemplating corrective measures that could bring the proceedings in question within the McCarren Amendment. That will be no small undertaking in the light of existing decrees below Granite Reef Dam on the Salt River.

Senator Goldwater has expressed interest in assisting the White Mountain Apache Tribe. The Senator has been made aware of the fact that the Department of Justice is seeking to force upon the Tribe representation in the Salt River litigation which is strenuously opposed by the Tribe. As emphasized to Senator Goldwater, the White Mountain Apache Tribe intent is to protect their invaluable rights in the Salt River and its tributaries. The Tribe cannot countenance the assertions that their rights will be presented to a court which the Tribe believes does not have jurisdiction. I am fully aware that the Federal District Court in Phoenix denied the Tribe's motion to dismiss the proceedings in question. I disagree with that ruling. Rest assured of this fact: The Tribe has a fighting chance by refusing to be joined in any state court proceeding involving the Salt River and its tributaries. For it to appear in those proceedings is to invite a systematic divestiture of its rights for the benefit of Federal non-Indian projects and other non-Indian claims. Because the Tribe believes that the state court Salt River proceedings do not come within the purview of the McCarran Act, it cannot countenance, nor does it acquiesce in the attempts by the Department of Justice to make a general appearance in those proceedings on behalf of the Tribe.

If you are of the opinion that the state court proceedings involving the Salt River and its tributaries are in fact McCarran Amendment proceedings, I would appre-

ciate a statement from you to that effect and authorities in support of your conclusion.

Sincerely,

/s/ Ronnie Lupe
RONNIE LUPE
Tribal Chairman
White Mountain Apache Tribe

RL/clr

APPENDIX K

Executive Office of the Chairman

WHITE MOUNTAIN APACHE TRIBE

August 27, 1980

Honorable Barry Goldwater
427 Russell Senate Office Building
Washington, DC 20510

Dear Senator Goldwater:

Thank you for your letter dated August 4, 1980 relative to the efforts of the Department of Justice to bring the White Mountain Apache Tribe into the Salt River Adjudication. That case is pending in the Superior Court of Maricopa County, State of Arizona. Accompanying your letter is a purported response to the Tribe's mailgram dated June 16, 1980 to Attorney General Benjamin Civiletti. In that mailgram, the Attorney General was specifically directed to refrain from attempting to represent the White Mountain Apache Tribe in the Salt River litigation.

You suggest that if the Tribe has prepared a legal memorandum which supports its position relative to the Salt River litigation that you be advised in regard to it. This letter sets forth the factual and legal position to which there is an adherence by the White Mountain Apache Tribe relative to the adjudication in question.

In denying that the Department of Justice can force its unwanted representation upon the Tribe in the Salt River case, the tribe relies upon a formidable body of facts and law.

Directly involved is President Carter's National Water Policy. Quite obviously, the Attorney General is seeking to carry out that mandate which has been carefully

analyzed by the White Mountain Apache Tribe. Succinctly stated, the President' water policy declares that where, in the biased view of the Federal bureaucracy, a non-Indian community can make better use of the water than the White Mountain Apache Tribe, the non-Indian community is entitled to that water. To the White Mountain Apache Tribe, that approach is a socialistic concept that is entirely foreign to the fundamental laws of this country which protect private property. It robs the weak; rewards the speculator. Succinctly stated, the issue is this: should the Indians who desperately need the water for survival be required to give up their water so a white man may have a swimming pool, an acre of lawn, and five bathrooms.

I cannot urge too strongly that the rights of the White Mountain Apache Tribe have been vested in it since time immemorial. To seize and take from the tribe their rights to use the water for the benefit of non-Indian projects and purposes is confiscatory in nature. Yet, when the litigation in question is fully analyzed, it is quite clear that the Tribe will be forced to pay the price for the failure of the Secretary of the Interior to properly administer the water supplies for the Salt River Federal Reclamation Project.

I repeat a truism which you already know: Water is life itself in Arizona. When the White Mountain Apache Tribe is confronted with the seizure of their rights or the diminution of those rights, it must seek to protect itself against the loss. These life-sustaining rights of the Tribes in the Salt River and its tributaries are invaluable.

History, facts, and law reject the idea that Attorney General Civiletti and the lawyers who work for him can force upon the White Mountain Apache Tribe the rejected representation by the Department of Justice. After prolonged warfare over title to our reservation, that title was affirmed in the White Mountain Apache Tribe by the

Executive Order signed November 9, 1871 by President Ulysses S. Grant. Congress has recognized our title to the White Mountain Apache Indian Reservation and the rights to use the waters in the Salt River and its tributaries which arise upon that reservation.[1] That title is protected against seizure by the Constitution.

Subjecting the rights to the use of the water to the White Mountain Apache Tribe to litigation where the jurisdiction of the court is extremely doubtful, can constitute confiscation of those rights. That fact prevails here because of the unconscionable conflict of interests which pervades the activities of the Attorney General. Reference will be subsequently made to that conflict of interest.

Here, it is important to urge to you that almost three-quarters of a century ago, the Supreme Court declared that title resides in the Tribes to the rights to the use of waters which arise upon, border, traverse, or underlie an Indian reservation.[2] Implicit in the *Winters* decision is the principle that the rights to the use of water of the Tribes are adequate to meet their present and future water requirements.[3] Repeatedly, the courts have reaffirmed those principles guaranteeing Indian rights to the use of water. In *Arizona* v. *California*,[4] the Supreme Court repeated the principles of law that protect the Indian rights to the use of water and said this: "The Court in *Winters* concluded that the Government, when they created that Indian Reservation, intended to deal fairly with the Indians by reserving for them the waters

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[1] In re Wilson, 140 U.S. 575 (1891); See also the opinion of the Attorney General, 29 opinions A.G. 239, 244 (1911); See also Hynes v. Grimes Packing Co., 337 U.S. 86 (1949); Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955).

[2] Winters v. United States, 207 U.S. 564 (1908).

[3] Conrad Investment Co. v. United States, 161 Fed. 829 (CA9, 1908).

[4] 373 U.S. 546, 598-601 (1963).

without which their land would have been useless. *Winters* has been followed . . . We follow it now and agree the United States did reserve the water rights for the Indians . . . the water was intended to satisfy the future as well as the present needs of the Indian Reservation . . ."

As will be reviewed, the White Mountain Apache Indian Tribe is of the opinion that the Maricopa County Court does not have jurisdiction over the Tribe's rights to the use of the water for the reason that the Salt River adjudication is not a "general adjudication" under the McCarran Act. All water claimants have not been joined in the proceedings. Under the circumstances prevailing, it is denied that Attorney General Civiletti has the power to force the Tribe into litigation which constitutes a grave threat to the rights of the Tribe. It denies that the Attorney General can properly represent the Tribe under the circumstances due to conflicts of interest.

To be observed in that regard is Attorney General Civiletti's declaration in his letter to you: "The United States, as trustee, is the owner of the legal title to the rights of the White Mountain Apache Tribe." As expressed, that concept is denied. The sole and only interest of the United States of America in the Tribe's rights to the use of water is the "naked" right of the trustee. It has the obligation solely to represent the interests of the White Mountain Apache Tribe—then, only for the purpose of protecting those rights in furtherance of the Tribe's interests.

Under no circumstances does the Attorney General occupy the status of solely representing the interests of the Tribe. Rather, the Department of Justice, in these proceedings, is immersed in conflicts of interest which prevent the Attorney General from adequately representing the Tribe—even assuming the Maricopa County Court has jurisdiction, which the Tribe denies. Where the Tribe's interests are gravely threatened by the activities

beyond the authority of a Federal official, the Supreme Court has made this ruling: "Power [of the United States] to control and manage a property and affairs of Indians . . . does not extend so far as to enable the Government 'to give the tribal lands to others or *to appropriate them to its own purposes*, without rendering, or assuming an obligation to render just compensation.' "[5] That seizure by employees of the United States of Indian property, " '. . . would not . . .' " said the Court, " 'be an exercise of guardianship . . .' " Rather, said the Court, it would be " 'an act of confiscation . . .' "[6] Removing all doubts that the trustee has an absolute obligation to protect the Indian rights, the Supreme Court further declared that "Spoliation is not management."[7]

Confiscation of the rights of the White Mountain Apache Tribe by the Secretary of the Interior acting in concert with the Attorney General is a reality. It will transpire here because the Attorney General will undoubtedly support the non-Indians against the Tribes as occurred in the case of *Hurley* v. *Abbott* from which emerged the infamous "*Kent Decree.*"

On August 6, 1980, representatives of the Department of Justice and the Solicitor's Office of the Department of the Interior reviewed before our Tribal Council their proposal to force their unwanted representation upon the White Mountain Apache Tribe in the Salt River litigation. Those officials advised the White Mountain Apache Tribal Council that they represented numerous agencies of the United States of America. Those agencies have interests diametrically opposed to the Tribe's rights in the Salt River and its tributaries. The agencies in question include, but are not necessarily limited to the National Forest Service, Fish and Wildlife, the Bureau of

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[5] Shoshone v. United States, 299 U.S. 476, 497 (1937).

[6] Ibid.

[7] Ibid., p. 498.

Reclamation, and the Bureau of Land Management. By far, the greatest adversary of the Tribe on the Salt River and its tributaries are the Federal reclamation projects which have been built or are now being built. Historically, the Salt River Federal Reclamation Project has been represented by the Department of Justice or by the Salt River Valley Water User's Association. The Association has a contract with the Secretary of the Interior to manage the Salt River Project. The claims of the Salt River Valley Water User's Association are of such magnitude that they would take all of the Salt River water to which the White Mountain Apache Indian Reservation is entitled. For the Attorney General to purport to represent my Tribe under these circumstances is unconscionable.

It is of extreme importance that the Secretary of the Interior has himself declared: "At the outset, I want to make clear the Department's position that, to date, the White Mountain Apache Tribe's *Winters* doctrine water rights remain unadjudicated and are unaffected by any judicial decree now in effect on the Salt River watershed. Moreover, it is our position that neither the authorization of the Salt River Project (SRP) nor the CAP compromised the Tribe's *Winters* rights." That statement is from a letter dated January 14, 1980 from the Secretary of the Interior to me as Chairman of the White Mountain Apache Tribe. Thus it is to this date, the White Mountain Apache Tribe's rights are intact. However, if its rights are subjected to the Salt River litigation, there can be little doubt that the Secretary of the Interior and the Attorney General would undertake to limit drastically the Tribe's rights in furtherance of conflicting Federal uses and other adverse claims.

My Tribe has rejected out of hand the attempt of the Department of Justice to represent it. Attached to this letter and made a part of it by reference is my letter dated April 24, 1980 to Attorney General Benjamin R.

Civiletti. There, I explain in detail that the Department of Justice cannot properly represent the Tribe. That circumstance arises from the all-encompassing conflict of interests of the Attorney General. Those conflicts of interest of the Attorney General where Indian rights are involved have been the subject of in-depth investigation by the Congress of the United States.[8]

Ten years ago, President Richard Nixon, in his July 8, 1970 message to Congress, summed up the Attorney General's conflict of interests involving Indian rights to the use of water as follows: "No self-respecting law firm would ever allow itself to represent two opposing clients . . ." Nevertheless, President Nixon pointed out that the Attorney General occupies that precise position in regard to Indian rights. Senator Kennedy's exhaustive investigations, as a member of the Senate Judiciary Committee, condemned the conflicts of interest of the lawyers of both the Departments of Justice and of the Solicitor's Office of the Interior.

Under the circumstances, it is impossible to perceive how the Attorney General can assert that he is acting for the agencies of the United States, whose claims are adverse to the Tribe, and at the same time assert that he is representing the interests of the White Mountain Apache Tribe. Quite obviously, the Attorney General's first allegiance is and always has been to the non-Indian water projects and non-Indian water uses, not to his obligation to the Indian Tribes. History of the "Kent Decree," involving rights to the use of water below Granite Reef Dam in the Salt River Valley, is a prime example of the unconscionable conduct of the Attorney General in representing non-Indian water rights. A full

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[8] See Federal Protection of Indian Resources, Parts 1 and 2, Hearings Before the Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary, United States Senate, 92nd Congress, Administrative Practices and Procedures, Relating to Protection of Indian Natural Resources.

history of the case of *Hurley* v. *Abbott*, out of which emerged the Kent Decree, will be supplied if you request it. It is one of the reasons for the adamant refusal of the White Mountain Apache Tribe to become party to the Salt River litigation.

The White Mountain Apache Tribe denies that anyone—the Attorney General included—has the power to appear in the Salt River litigation for the White Mountain Apache Tribe—or indeed the United States of America. In that regard, there is attached a copy of my communication directed to Judge Stanley Z. Goodfarb, who presides over the Salt River litigation in the Maricopa County Court. There I emphasize crucial factors which the Department of Justice has ignored in its effort to force upon my Tribe the costly and, it is believed, futile litigation. There are three primary aspects of the Tribe's objections to the Attorney General's purported representation of the Tribe in the adjudication in question:

1. the White Mountain Apache Tribe is immune from suits;

2. the Tribe's immunity from suit has not been waived, and the Tribe denies that anyone has the right to appear on its behalf;

3. Salt River litigation is not a "general adjudication" within the meaning of 43 U.S.C. 666—the so-called McCarran Act. That Act waives the immunity of the United States only in "general adjudication proceedings" which resolve all conflicting rights in a stream system. The Salt River case does not purport to be a general adjudication of the nature prescribed by Congress. (Judge Cordova disagrees. I believe he is in error—see my statement to Judge Goodfarb.)

Attempted corrective actions may be taken—I am informed by the State of Arizona—in recognition of the

fact that the Salt River litigation is *not* a McCarran Act proceeding. Arizona, it is said, is planning greatly to broaden the Salt River litigation in an effort to comply with the McCarran Act. I am also informed that the Department of Justice and the Solicitor's Office of the Department of the Interior are aware that the Salt River litigation does not come within the purview of the McCarran Act. It may well be that representatives of those two departments will either deny that statement or wish to explain their positions in that regard. I would be delighted to hear an explanation of their legal position and to respond to it. Quite obviously, the burden is upon them to advise you and the White Mountain Apache Tribe of the legal basis for the attempted appearance by the Department of Justice in the Salt River litigation.

It is established principle of jurisprudence resting upon public policy that the United States of America and the White Mountain Apache Indian Tribe cannot be sued in their own court or any other court without a waiver of their sovereign immunity from suit. Courts have historically adhered to that principle of law. On the subject, the Supreme Court has said this: "The exemption from direct suit is . . . without exception . . . . [The United States and the White Mountain Apache Indian Tribe] . . . cannot be subjected to legal proceedings, at law or in equity, without their consent; *and whoever institutes such proceedings must bring his case within some act of Congress.*" [9]

In regard to the immunity from suit of Indians and their property, the Supreme Court stated: ". . . [the State] cannot maintain this suit against the United States unless authorized by some act of Congress." This crucial statement was then added:

> Where jurisdiction has not been conferred by Congress *no officer of the United States [including the*

[9] Belknap v. Schild, 161 U.S. 10, 16 (1895).

Attorney General] has power to give any court jurisdiction of a suit against the United States [involving Indian property].[10]

There is now and has been a strict adherence by the Courts to the principles reviewed immediately above in regard to the McCarran Act.[11] I deny on behalf of my Tribe that:

a) Attorney General Civiletti is empowered to force the unwanted representation of the Department of Justice upon the White Mountain Apache Indian Tribe under the guise of fulfilling the trust obligation; and

b) the Congress has authorized the Attorney General to make a "general appearance"—as has been attempted—in the Salt River litigation and involve the Tribe in that litigation.

It is elemental that the Attorney General, by his attempted appearance in the Salt River litigation, cannot confer upon that court the jurisdiction that would be binding upon the Tribe. For these reasons, I believe Attorney General Civiletti and his staff are violating the sovereign, human, constitutional, and civil rights of the White Mountain Apache Tribe. The Attorney General's conduct, in my view, is illegal.

Immediate corrective action is required. Your support against this high-handed bureaucratic conduct by the Federal lawyers will be appreciated. The White Mountain Apache Tribe—if it must—will fight back against the Department of Justice and the Department of the

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[10] Minnesota v. United States, 305 U.S. 382, 386, 389 (1938); See also Stanley v. Schwalby, 162 U.S. 255 (1896); Land v. Dollar, 330 U.S. 731 (1946); Mine Safety Co. v. Forestall, 326 U.S. 371, 373 (1948); Larsen v. Domestic and Foreign Corp., 337 U.S. 682 (1948).

[11] See my attached statement to Judge Stanley Z. Goodfarb, Superior Court of Maricopa County, p. 3.

Interior who are seeking to violate the Tribe's rights by forcing them into the highly questionable Salt River litigation against its will.

I greatly appreciate your interest in regard to this matter so vital to the White Mountain Apache Indian Tribe. If there is further information that would be helpful to you in regard to this litigation, please feel free to call upon me. My tribe is fighting desperately to survive. It cannot survive if its rights are taken from it as is now being attempted.

Sincerely,

/s/ Ronnie Lupe
RONNIE LUPE
Tribal Chairman
White Mountain Apache Tribe

RL/clr
Enclosures

APPENDIX L

[SEAL]

UNITED STATES DEPARTMENT OF JUSTICE

ASSISTANT ATTORNEY GENERAL
LAND AND NATURAL RESOURCES DIVISION
Washington, D.C. 20530

November 25, 1980

Honorable Barry Goldwater
United States Senate
Washington, D.C. 20510

Dear Senator Goldwater:

Your letter of October 29, 1980, to the Attorney General concerning the representation of the White Mountain Apache Tribe by the United States in a state court water rights adjudication has been referred to me for reply. As you are aware, this Department and the Department of the Interior have engaged in a dialogue with the tribe on this question for the past several months.

I believe it would be helpful in responding to your letter, and to Chairman Lupe's letter, to restate some facts and legal principles. First, the United States has a separate interest as a trustee in the water rights involved. The United States owns legal title to those rights for the benefit of the White Mountain Tribe. The primary purpose of the trust is to protect Indian owned realty and water rights from expropriation by non-Indians. This Department has consistently taken the view that the responsibility of the United States as

trustee is defined by treaties, statutes and relevant court decisions.[1]

Congress in enacting the McCarran Amendment, codified at 43 U.S.C. 666, has waived the sovereign immunity of the United States to general adjudications of water rights in a watershed. The Supreme Court has recently told us that the waiver of sovereign immunity extends to water rights held by the United States as trustee for Indian tribes.[2]

Hence, *if* this adjudication of the Salt River watershed is a general adjudication, then the United States is a proper party and the Maricopa County Court does have jurisdiction to adjudicate all the rights of the United States in the watershed, both those it owns as a proprietor, and those it holds in trust for the Indian tribes.

However, we have not conceded that the present action is now a general adjudication. First, we have grave doubts that the adjudication is sufficiently comprehensive, both geographically and as to the interests in water sought to be adjudicated, to be categorized as a general adjudication within the terms of the McCarran Amendment. We understand that officials of the State of Arizona are aware of our concern and are contemplating steps to expand the proceedings to encompass the entire Gila River watershed. We do not know what those steps may be, nor do we know when the State may implement whatever decision it may ultimately reach.

There may well be other jurisdictional defects in the present proceedings which will be presented to the court

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[1] For your information we have appended a copy of a letter from former Attorney General Griffin B. Bell to Secretary of the Interior Cecil Andrus, defining the Departments' joint views on this question.

[2] *Colorado River Water Conservation District* v. *United States*, 424 U.S. 800 (1976). The case is commonly referred to as the *Akin* decision, a companion case.

at the proper time. We agree with Chairman Lupe's statement that no federal official can waive the sovereign immunity of the United States, where Congress has not done so. This principle demands that this Department challenge the jurisdiction of a court when it appears that the suit does not fall within the perimeters of the waiver of immunity.

Turning then to the second theme of Chairman Lupe's letter, we do not believe that a conflict of interest inheres in the present case. Since Congress has waived the sovereign immunity of the United States to general adjudications of water rights, and the Supreme Court has held that this waiver includes those water rights held for Indians, it follows that if the United States is named a defendant in a water rights case, it must assert *all* water rights it owns or run the very real risk of losing those water rights not asserted. We believe that it is the Chairman's position that if the United States does not assert the White Mountain Tribe's reserved rights, the tribe does not plan to intervene to assert that right on its own behalf. We view that course to be incompatible with our duty as a trustee, since the almost inevitable result—if the court is ultimately held to have jurisdiction—would be the complete loss of the tribe's reserved rights.

The tribe complains of two conflicts of interest. First, the largest claimant is a federally funded and built irrigation project, the Salt River Project. The tribe believes that the United States will not attack the earlier Kent decree and that it will assert that the tribe's rights are foreclosed by that decree. Neither of these assumptions are correct. Second, the tribe complains that since the United States will assert rights on behalf of other federal agencies a disabling conflict occurs. It is true that claims for other federal agencies will be asserted in this case. However, we have not yet developed suffi-

cient facts to determine whether these claims will in fact interfere with one another. Even if they do so interfere, the United States under the McCarran Amendment and the *Akin* decision must present all of its claims. In effect, there is *one* federal claim, and if decisions must be made between those claims, the early priority of the tribal claims and the solicitude shown by the Executive Branch towards Indian claims will tend to insure that the Indian claims will be fairly treated.

We have examined the Comptroller General's opinion which you cited in your letter, and find that it deals with the compensation of tribal attorneys in situations where either a court has declared that the United States has a conflict of interest, or the Secretary determines in his discretion that attorneys fees ought to be paid to the tribal attorney where the tribe has intervened in litigation in which the United States is already a party. Neither of these situations occur here.

Sincerely,

/s/ James W. Moorman
JAMES W. MOORMAN
Assistant Attorney General
Land and Natural Resources
Division

May 31, 1979

Honorable Cecil D. Andrus
Secretary of Interior
Washington, D.C.

Dear Mr. Secretary:

As you know, the Department of Justice has long represented the United States in litigation for the purpose of protecting Indian property rights secured by statutes or treaties. This has been and will continue to be an important function of this Department, and I would like to set forth my understanding of the legal principles governing its conduct.

In fulfillment of the special relationship contemplated in the Constitution between the Federal Government and the Indian tribes, the Congress has enacted numerous laws and the Senate has ratified numerous treaties for the benefit and protection of Indian tribes and individuals, their property and their way of life. Where these measures require implementation by the Executive Branch, the administrative responsibility typically resides with the Secretary of the Interior. 43 U.S.C. § 1457(10). The Attorney General is in turn responsible for the conduct, on behalf of the United States, of litigation arising under these statutes and treaties. This obligation in Indian cases is but one aspect—albeit an important one—of the Attorney General's statutory responsibility for the conduct of litigation in which the United States or an agency or officer thereof is a party or is interested. 28 U.S.C. §§ 516, 519.

The Secretary of the Interior and the Attorney General perform their duties here, as in all other areas, under the superintendence of the President. We are the President's agents in fulfilling his constitutional duty to take care that the laws be faithfully executed. Where a particular statute, treaty, or Executive Order manifests

a purpose to benefit all Indians or a tribe or individual Indians or to protect their property, it is the obligation of the responsible Executive Branch officials to give full effect to that purpose. In your role as Secretary of the Interior, you are charged with administering most of the laws and treaties applying to Indians and are often in a policy formulating role with regard thereto. And where litigation is concerned, it is the duty of the Attorney General to ensure that the interest of the United States in accomplishing the congressional or executive purpose is fully presented in court.

The Executive and Judicial Branches have inferred in many laws extending federal protection to Indian property rights the intent that the Executive act as a fiduciary in administering and enforcing these measures. Where applicable law imposes such standards of care, faithful execution of the law of course requires the Executive to adhere to those standards. Thus, it in no way diminishes the central importance of our respective functions to acknowledge that they find their source in specific statutes, treaties, and Executive Orders or to recognize that they are to be performed with the same faithfulness to legislative and executive purpose as are the obligations devolving upon this branch of the federal establishment generally.

A significant portion of the litigation with which we are here concerned relates to property rights reserved to a tribe by treaty or in the creation of a reservation or property which Congress has directed be held in trust, managed, or restricted for the benefit of a tribe or individual Indian. When the Attorney General brings an action on behalf of the United States against private individuals or public bodies to protect these rights from encroachment, he vindicates not only the property interests of the tribe or individual Indian, as they may appear under law to the United States, but also the important governmental interest in ensuring that rights

guaranteed to Indians under federal laws and treaties are fully effective.

There is no disabling conflict between the performance of these duties and the obligations of the Federal Government to all the people of the Nation. The functional thesis upon which our form of government is premised—the Separation of Powers—pre-supposes that the people as a whole benefit when the Executive Branch enforces the laws enacted, and protects Indian property rights recognized in treaty commitments ratified, by a coordinate branch. The fact that an identifiable class realizes tangible benefits from litigation brought by the Federal Government does not distinguish Indian cases from many civil rights, labor, and other cases. Just as we go to court to enforce the laws designated to protect minorities from discrimination or disenfranchisement by the majority, we must litigate when necessary to protect rights secured to Indians without reference to whether any present majority of the citizenry would profit from, or otherwise embrace, that action.

It is important to emphasize, however, that the Attorney General is attorney for the United States in these cases, not a particular tribe or individual Indians. Thus, in a case involving property held in trust for a tribe, the Attorney General is attorney for the United States as "trustee," not the "beneficiary." He is not obligated to adopt any position favored by a tribe in a particular case, but must instead make his own independent evaluation of the law and facts in determining whether a proposed claim or defense, or argument in support thereof, is sufficiently meritorious to warrant its presentation. This is the same function the Attorney General performs in all cases involving the United States; it is a function that arises from a duty both to the courts and to all those against whom the Government brings its considerable litigating resources.

The litigating position adopted by the Attorney General on behalf of the United States may affect your adminis-

trative and policy-making functions. Accordingly, with respect to all litigation in which the Attorney General represents the United States in protecting Indian property rights secured by statutes or treaties, this Department would expect to receive—and would most carefully consider—the advice of your Department, possessing as it does the primary policy responsibility in Indian matters.

5-4.000 *THE INDIAN RESOURCES SECTION*

5-4.001 *Establishment of the Indian Resources Section*

The Indian Resources Section was created on May 27, 1975, by Land and Natural Resources Directive No. 6-75, to conduct litigation for the United States as trustee for the private rights of Indian people.

5-4.100 *General Responsibilities*

The Indian Resources Section supervises the litigation of civil suits in which the United States protects tribal assets and jurisdiction, and asserts on behalf of Indian individuals and tribes rights to property, including hunting and fishing rights and water rights. Civil litigation involving the infringement of tribal self-government (sovereignty) by states in the fields of taxation, alcoholic beverage control, law enforcement, reservation boundaries and other related matters is the responsibility of this Section.

5-4.120 *Statutes Administered*

Most of the statutes pertaining to the trust responsibilities of the United States to the Indian people are found in Title 25 of the United States Code.

Treaties and executive orders are compiled in Kapplers, *Indian Affairs, Laws and Treaties*, a five-volume work which is now being revised. Cohen's *Handbook of Federal Indian Law* is a valuable research tool for use in understanding Indian litigation, and the statutes involved.

The Indian Resources Section does not administer cases under the Indian Civil Rights Act, 25 U.S.C. 1302, as the Indian Rights Section of the Civil Rights Division has the responsibility for enforcing this section. The General Litigation Section of the Land and Natural Resources Division has the responsibility for litigation of cases brought by Indians or Indian tribes against the United States or Federal officials (see 5-7.000). The Indian Claims Section of the Land and Natural Resources Division has jurisdiction of money claims brought by Indian tribes against the United States (see 5-6.000).

5-4.130 *Legal Principles Governing Litigation Involving Indian Property Rights*

The following is the text of a letter from Attorney General Bell to Secretary of Interior Cecil Andrus concerning the role of the Department of Justice in Indian Trust Litigation.

Where there are other statutory obligations imposed on the Executive in a particular case aside from those affecting Indians, faithful execution of the laws require the Attorney General to resolve these competing or overlapping interests to arrive at a single position of the United States. In arriving at a single position, however, we must also take into account the rule of construction now firmly established that Congress' actions toward Indians are to be interpreted in light of the special relationship and special responsibilities of the government toward the Indians.

And, finally, the President's duty faithfully to execute existing law does not preclude him from recommending legislative changes in fulfillment of his constitutional duty to propose to the Congress measures he believes necessary and expedient. These measures may—indeed must—be framed with the interest of the Nation as a whole in mind. In so doing, the President has the constitutional authority to call on either of us for our views

on legislation to change existing law notwithstanding the duty to execute that law as it now stands.

I look forward to close cooperation between our two Departments in these matters.

Yours sincerely

GRIFFIN B. BELL
Attorney General

APPENDIX M

BEFORE THE STATE LAND DEPARTMENT OF THE STATE OF ARIZONA

IN THE MATTER OF THE DETERMINATION OF CONFLICTING RIGHTS TO THE USE OF WATER FROM THE SALT RIVER ABOVE GRANITE REEF DAM AND ITS TRIBUTARIES INCLUDING TONTO CREEK, EXCLUDING THE VERDE RIVER AND ITS TRIBUTARIES

SALT RIVER VALLEY WATER USERS' ASSOCIATION,
Petitioner

PETITION TO DETERMINE CONFLICTING WATER RIGHTS

COMES NOW the SALT RIVER VALLEY WATER USERS' ASSOCIATION, a corporation, and respectfully represents unto the State Land Commissioner as follows:

I.

That the Petitioner, SALT RIVER VALLEY WATER USERS' ASSOCIATION, an Arizona Corporation, by its Articles of Incorporation and by agreement with the United States of America is charged with the duty of and is engaged in the delivery of water to all of the land having a valid water right situated within the Salt River Reservoir District.

II.

That the rights to the use of water upon land situated within the Salt River Reservoir District have been duly adjudicated and approved by that certain decree commonly referred to as the Kent Decree in the case of *Hurley vs. Abbott*, No. 4564 in the District Court of the Third Judicial District of the Territory of Arizona, in and for the County of Maricopa.

III.

That as a result of the said Kent Decree and the appropriations made by the Petitioner and the United States of America for and on behalf of the Petitioner's shareholders prior to June 20, 1919, the date of the passage of the State Water Code, there has been appropriated by the Petitioner's shareholders and others all of the water of the Salt River and the Verde River and all of the tributaries thereto above Granite Reef Dam; that all of said appropriated waters, since their respective dates of appropriation have been and continue to be beneficially used by Petitioner's shareholders and others.

IV.

That, notwithstanding that all of the waters of the Salt River and its tributaries above Granite Reef Dam, including Tonto Creek, have been lawfully appropriated and are now being put to beneficial use, your Petitioner is informed and believes and therefore alleges that from time to time from June 20, 1919 to the present, other diversions and uses of water have been made and are being made from the Salt River and its tributaries, including Tonto Creek, for irrigation and other purposes; that said diversions of water have been made without any legal right and have been made contrary to the laws of the State of Arizona and contrary to the State Water Code of the State of Arizona, all of which diversions and uses are in conflict with and result in damage to your Petitioner's shareholders and the other landowners having valid appropriative rights to the use of such water by reason of the resulting diminished supply of the Salt River.

V.

That no comprehensive determination or adjudication of the conflicting rights to the use of water from the Salt River and its tributaries has been made for the

land situated within the Salt River Basin area above Granite Reef Dam, exclusive of the land within the Verde River Basin thereof, which said land is more particularly described by township and range of Exhibit "A", attached hereto and by this reference made a part hereof and which said land is further shown on the map attached hereto, marked Exhibit "B" and by this reference made a part hereof.

VI.

That a determination of the relative rights of the various claimants to the waters of the Salt River and its tributaries in the aforementioned area by the State Land Department, pursuant to Arizona Revised Statutes, Sections 45-231 through 45-245, is justified by reason of the large number of claimants to establish the legal rights of each.

WHEREFORE, your Petitioner respectfully prays that the State Land Department give proper notice, fix a time to take testimony and make the examination necessary for the determination of the water rights of the various claimants to the land situated within the Salt River Basin area above Granite Reef Dam, exclusive of the land within the Verde River Basin thereof, pursuant to Arizona Revised Statutes, Section 45-231 through 45-245.

DATED this 26 day of April 1974.

SALT RIVER VALLEY WATER
USERS' ASSOCIATION

/s/ By R. J. McMullin
R. J. McMULLIN
General Manager

STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

On this the 26 day of April, 1974, before me, the undersigned Notary Public, personally appeared R. J. McMullin who acknowledged himself to be the General Manager of the SALT RIVER VALLEY WATER USERS' ASSOCIATION and that he, as such officer, being authorized so to do, executed the foregoing instrument for the purposes therein contained by signing the name of the corporation by himself as such officer.

IN WITNESS WHEREOF, I hereunto set my hand and official seal.

/s/ Don E. Smith
Notary Public

My Commission Expires: May 3, 1975

APPENDIX N

IN THE SUPERIOR COURT OF MARICOPA COUNTY IN AND FOR THE STATE OF ARIZONA

Maricopa County No. W-1

STATEMENT OF RONNIE LUPE, CHAIRMAN, WHITE MOUNTAIN APACHE INDIAN TRIBE, SOLELY FOR THE PURPOSE OF BRINGING TO THE COURT'S ATTENTION THAT THE WHITE MOUNTAIN APACHE INDIAN TRIBE'S RIGHTS TO THE USE OF WATER IN THE SALT RIVER AND ITS TRIBUTARIES ARE NOT SUBJECT TO THIS COURT'S JURISDICTION:

IN THE MATTER OF THE DETERMINATION OF THE CONFLICTING RIGHTS TO THE USE OF WATER FROM THE SALT RIVER ABOVE GRANITE REEF DAM AND ITS TRIBUTARIES INCLUDING TONTO CREEK, EXCLUDING THE VERDE RIVER AND ITS TRIBUTARIES.

SALT RIVER VALLEY WATER USERS' ASSOCIATION,
Petitioner.

I am Ronnie Lupe, the duly elected and acting Chairman of the White Mountain Apache Indian Tribe, an organized Tribe recognized by the Secretary of the United States Department of the Interior, occupying the lands comprising the Fort Apache Indian Reservation, Whiteriver, Arizona, and solely for the purpose of comity and without in any way admitting to jurisdiction to this Court but, rather, denying that this Court has jurisdiction over the Tribe's rights to the use of water in the Salt River and its tributaries or any other rights in the above-entitled case or in any other case or administrative proceeding, I make the following statement:

I.

There is attached to this statement, marked Exhibit A, and by reference made a part of this statement, Resolution No. 80-29, unanimously adopted February 7, 1980,

by the Tribal Council of the White Mountain Apache Indian Tribe, the governing body of that Tribe.

II.

By reason of that Resolution, neither I nor anyone else is authorized to appear in this Court for the purpose thereby of subjecting the Tribe's invaluable and life-sustaining rights to the use of water in the Salt River and its tributaries, title to which has resided in and continues to reside in the White Mountain Apache Indian Tribe since time immemorial, and the sole interest of the United States of America in and to those rights is that of trustee for the Tribe, its obligation being to protect and preserve those rights to the use of water for the benefit of the Tribe.

III.

In conformity with the aforesaid Tribal Resolution No. 80-29, by my letter of April 24, 1980, to the Honorable Benjamin R. Civiletti, Attorney General of the United States, I advised the Attorney General that the White Mountain Apache Tribe

> ". . . will vigorously resist any effort on the part of the Department of Justice to represent us in the Federal Court, the State Court, or any Federal or State administrative tribunal involving our rights in the Salt River and its tributaries."

A copy of that letter to the Attorney General is attached to this statement, marked Exhibit B and made a part of it by reference. By that communication to the Attorney General, that officer and the Department of Justice over which that official presides, are specifically advised that under no circumstances is there to be an effort on the part of the Department of Justice or anyone else in the Federal Government to subject the rights of the White Mountain Apache Indian Tribe in and to the waters of the Salt River and its tributaries to the jurisdiction of this Court.

IV.

When a subordinate of the Department of Justice, by a letter dated May 15, 1980, advised that the Justice Department might, in its discretion, over the objection of the White Mountain Apache Indian Tribe, purport to represent the White Mountain Apache Indian Tribe in the proceedings in question, I reiterated and reaffirmed the Tribe's position in a letter dated May 28, 1980, addressed to the Attorney General. A copy of that communication is attached, marked Exhibit C, and incorporated into this statement by reference.

V.

Still more recently, I advised the Attorney General of the United States that the Tribe's probihition against any attempted appearance in the above-entitled proceedings applied to any and all rights to the use of water, title to which resides in the Tribe. That notice to the Attorney General is contained in a mailgram, dated June 16, 1980, which is as follows:

> "Refer to my letters to you April 24 1980 May 28 1980 and to Tribal Council Resolution Number 80-29 denying Justice Department's authority to appear in Salt River water rights adjudication on behalf of the White Mountain Apache Tribe, US Fish and Wildlife Services letter of May 29 1980 to the Justice Department proposes that the Justice Department is to appear in the Salt River proceedings respecting water rights for Alchemy and Williams Creek Fish Hatcheries. The Tribe holds legal title to such fish hatcheries rights. The Tribe denys Justice's authority to attempt to represent it respecting those rights. Justice may not attempt to appear on behalf of the Tribe relative to fish hatchery rights or any other rights title to which is in the Tribe."

VI.

The White Mountain Apache Indian Tribe is immune from suit and has not waived its sovereign immunity

from suit in proceedings of the character here involved or in any other proceedings.[1]

VII.

The White Mountain Apache Indian Tribe moreover denies that the Congress of the United States has waived the Tribe's immunity from suits of the limited character here involved.[2]

---

[1] White Mountain Apache Indian Tribe, *et al.*, v. Shelley, 107 Ariz. 4, 480 P.2d 654 (1971).

[2] From the caption of these proceedings, it is manifest that they are not a "general adjudication" within the contemplation of 43 U.S.C. 666— assuming the applicability of that congressional enactment to the White Mountain Apache Indian Tribe, which is denied. See, in that connection Dugan v. Rank, 372 U.S. 609, 618 (1963). The "general adjudication" concept was ignored in the order entered January 18, 1980, in the United States District Court for the District of Phoenix, Civil No. 79-182 PHX-VAC. In error, that Court said this:

> "The McCarran Amendment [43 U.S.C. 666] applies to the adjudication and administration of 'right to the use of water of a river system or other source'. The State proceedings encompass all water appropriable under State and Federal law. Whether these causes remain in this Court for determination or are left for determination in the State courts, the applicable law will be the same. Those rights which are State created will be determined by State law and Federal law will be applied to determine those rights which derive from Federal law. It is difficult, therefore, to imagine how the State proceedings could be considered as anything less than a general adjudication of water rights."

That statement departs so gravely from the meaning of "general adjudication" as contemplated by 43 U.S.C. 666 that the White Mountain Apache Indian Tribe would, in effect, be voluntarily submitting itself to state jurisdiction and could not be brought within the purview of 43 U.S.C. 666 by the most strained interpretation of the law that the mind could conceive. For the Justice Department to attempt to force upon the White Mountain Apache Indian Tribe the jurisdiction of this Court would be a clear violation of the obligations of the United States of America as trustee for the Tribe.

For the reasons stated, the White Mountain Apache Indian Tribe respectfully submits that any judgment or decree entered in the proceedings in question will be unenforceable against the White Mountain Apache Indian Tribe and the Tribe will vigorously resist any attempt to enforce any judgment or decree emanating from these proceedings against it.

Respectfully submitted this 24th day of June 1980.

/s/ Ronnie Lupe
RONNIE LUPE
Chairman
White Mountain Apache Indian Tribe

For Exhibit A, Resolution No. 80-29, see, page 69a, *supra*.

For Exhibit B, April 24, 1980 letter, see, page 99a, *supra*.

For Exhibit C, May 28, 1980 letter, see, page 106a, *supra*.

APPENDIX O

IN THE DISTRICT COURT
OF THE
THIRD JUDICIAL DISTRICT
OF THE TERRITORY OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

No. 4564

PATRICK T. HURLEY,
Plaintiff,

THE UNITED STATES OF AMERICA,
Intervenor,

Against

CHARLES F. ABBOTT and
Four Thousand Eight Hundred Others,
Defendants.

Before CHIEF JUSTICE KENT,
Sitting as DISTRICT JUDGE

DECISION AND DECREE

Filed March 1st, 1910

Printed by
SALT RIVER VALLEY WATER USERS' ASSOCIATION

* * * *

To this agreement and to this distribution of the water protest has been made from time to time since the rendition of the Wormser decree, by individual land owners not content with the action of the canal company serving them with water in that regard, and various suits have been instituted from time to time in this Court to test the validity of such distribution of the water under such arrangement, none of which suits have ever come to final judgment, and one of which, at least, is still pending awaiting the determination of this proceeding.

In the year 1903 the United States Government, acting by the authority of Congress under what is known as the reclamation act, commenced the construction of an impounding dam, known as the Roosevelt dam, upon the Salt river just below the conflux of Tonto creek with the Salt river, at a point about seventy-five miles east of the city of Phoenix, for the purpose of storing the waters of the Salt river in a reservoir at that point. This dam, now rapidly approaching its completion, will be approximately 280 feet in height above bedrock, will create a reservoir lake of some twenty-five miles in length and an average of more than one mile in width, and will impound approximately 1,300,000 acre feet of water. The height of the dam is already sufficient to impound at present a large body of water, and its completion is expected within the next few months. The object of the dam and the purpose of the Government in its erection is to store in the reservoir the surplus water in the Salt river over and above the amount of the normal flow of the river appropriated and used. The Government also finished the construction in the year 1908 of a permanent diversion dam across the Salt river known as the Granite Reef dam at a point about twenty-five miles east of Phoenix, three miles below the conflux of the Verde river, from which dam water is now being diverted into the Arizona canal for the use of the land lying

on the north side of the river, and which now diverts a large portion and which is capable of diverting all of the water necessary for the land on the south side of the river.

An association of land owners known as the Salt River Valley Water Users' Association was formed, comprising nearly all the owners of the land lying on the north side of the river embraced in this suit, capable of irrigation, and the owners of a majority of all the land lying on the south side of the river. The owners of a large majority of the land lying under the Tempe and San Francisco canals, however, have not joined the association. By contracts between the Government and the members of the water users association, the latter will be entitled to receive for their land their proportionate share of the surplus water that may be stored by the Government in its impounding reservoir. Those not in the association will have no contractual rights with the Government with respect to the water thus impounded.

In the year 1905 this suit was instituted by the plaintiff, P. T. Hurley, he claiming to be an early appropriator of water, and asking to have his title quieted to the use of an amount of water sufficient to cultivate the land owned by him. He made as defendants in the suit a large number of other individual land owners in the valley. After the commencement of the suit, the United States, having acquired the possession and ownership of the canals on the north side of the river, and being interested in its capacity as guardian of a number of Indian settlers on the reservations situated in the valley, by leave of Court first obtained, intervened as a party in the suit and filed its answer and cross complaint, and sought and obtained process to make party defendants to its cross complaint all land owners in the district in the valley irrigated by the canals above mentioned, and prayed for a judgment establishing the rights of each individual defendant and each parcel of land to the water in the river,

and the establishment of the various dates of appropriation of water by each individual land owner. These various individual land owners, some four thousand eight hundred in all, were served with process in the suit, and evidence has been taken before the Court respecting the duty of water and the dates of reclamation of the various parcels of land in the irrigable district in the valley in question from the year 1869 to and including the year 1909, the testimony being taken intermittently during a period of two and one-half years. The case is now before the Court for adjudication.

The purpose of this suit is to obtain a judicial determination and definition of the rights of the various parcels of land and the owners thereof under the various canals above mentioned in and to the use of the water flowing in the Salt and Verde rivers. For a complete and effective adjudication of such rights it is necessary not only to determine the date of appropriation of the water to each parcel of land, but also the amount of the water appropriated and the relative right of each parcel to the other.

The doctrine of riparian rights does not obtain in Arizona. The right of the owner of land to divert from a natural non-navigable stream the flow of the water therein and to apply the same to beneficial use upon such land, is and always has been recognized in this Territory. Such diversion and use is termed an appropriation of water. Whatever may be the steps necessary to take to initiate such a right or to evidence the intent to initiate it, the appropriation itself only becomes complete and vested when the water is actually diverted from the stream and placed to a beneficial use upon the land. The right given by such an appropriation is strictly not a right to the water itself, but a right to the use of the water. Its application to a beneficial use upon the land is as necessary in order to complete the right as is the diversion thereof from the stream. An appropriation

of water, therefore, for the purpose of the irrigation of a parcel of land may not be established and completed by means merely of a declaration of intention or by the posting of notices of appropriation, nor may it be made by a canal owner or by a canal company as such alone, independent of its ownership of the land; but as application to a beneficial use upon the land is necessary to complete the appropriation, it follows that such appropriator must be an owner of land or have a possessory right thereto.

* * * *

The third class of land is that which may be known as land in class C. It is such land as is situated within the irrigable district lying under the canals above mentioned, or their possible extensions, not included in classes A or B, upon which no cultivation has been had or as to which no appropriation or attempt at appropriation of the flow in the river at or above the Joint Head, has been made in the past. They are not entitled to the establishment of any right of appropriation in this suit.

The land in these three classes may be found upon the map hereto attached, marked Map No. 2, in colors as thereon designated.

By agreement entered into between the United States and the Water Users' Association, the members of the latter, whether owners of land in classes A, B or C, are to be entitled to the benefits of the stored water in the Roosevelt reservoir, in such extent of acreage as the project shall serve. These benefits are to be formally obtained by those entitled thereto after the completion of the dam and upon the formal opening thereafter by the Government of this reclamation project, by contractual obligations then to be entered into by the members of the Water Users' Association with the Government. The stored water is to be distributed to those who shall have

the right thereto, proportionally according to the acreage of the land, and irrespective of any priority of irrigation or cultivation of such land. Under the decision herein the owners of land in class A and in class B, because of the cultivation in the past of their land, and the facts as found, have a preferential right over the owners of land in class C to apply for and obtain from the Government a right to their proportionate share of the stored water needed by them. This preferential right to the owners of land in classes A and B is not a right to the water itself, nor does it give to those applying for and obtaining such right a priority in use or in extent of use to the stored water over owners of land in class C who may also apply and receive a similar right to the water. The preference given is merely and only that of a right to make application and have listed as sharers in the stored water the land in classes A and B before the owners of land in class C, whose land, if listed, will be listed subject to such prior right of application. Such priority of application, in order to be effective, must be availed of and be asserted both as to the owners of land in class A and the owners of land in class B within a reasonable time in order that certainty as to existing rights of all the land in the valley, as well to the surplus and stored as to the normal supply of water, may be speedily and definitely ascertained and determined. Such reasonable time is hereby fixed as one year from the formal opening by the United States Government of this reclamation project. Within such time all the owners of the land in classes A and B, in order to avail themselves of such prior right, must apply therefor to the United States Government or its reclamation officials in charge of this project, under such rules and regulations governing such application as shall be promulgated by such officials; and on and after such date all the parcels of land in classes A and B for

which application for such stored water shall not have been made, or which for good cause shall not have had such application therefor granted, shall cease to have any such preferential right of application over and above the land in class C.

• • • •

Whenever, for the economical conservation, diversion, or distribution of the water, it shall be desirable and expedient that the water to be delivered to any canal system for distribution to the land under it entitled thereto, be carried thereto from the point of diversion in the river to such delivery by another canal, or by a number of other canals, such canal or canals, upon a written order by the Commissioner, shall carry such water in its or their canals and deliver the same to the canal entitled to receive it for distribution, subject, however, to a payment by such latter canal of such proper charges for such diversion and carriage as may be agreed upon, or as shall be determined by the Court or Judge, but no such order upon any such canal company for such carriage shall be made by the Commissioner without the signed approval thereon of the Judge.

The Hayden mill has established a right to the use of water for power purposes only, dating from the year 1874, in a maximum amount of eleven hundred (1,100) miners' inches. The method of diversion and carriage of the water shall be such as will enable the mill, when the supply is sufficient, to make use of such water as it is entitled to.

For more than forty years the Indians living on the reservation on the north side of the river, known as the Salt River Reservation, in township two north, range five east, have had delivered to them from the river for

the cultivation of their land 500 miners' inches of water, irrespective of the amount of water in the river, whether scarce or plenty, and such water has been measured and delivered to them for the last twenty years before the segregation and division of any water to other water users. This land has acquired a prior right over and above all others to this amount of 500 inches. The amount of land to which this water has been applied is about 2,500 acres. This amount of water is insufficient properly to cultivate this amount of land. The evidence shows that for the cultivation thereof at least 700 miners' inches is necessary. Strictly, the additional 200 inches necessary could be decreed to these lands only after others prior in right had received the water to which they are entitled. In consideration, however, of the fact that the 500 inches to which the land at low stages is entitled is not increased, even when at the higher stages of the river the land by its acreage and early date of reclamation might be entitled to more than such 500 inches, and in order to avoid the practical difficulty of a method of distribution which would combine a definite fixed quantity at all stages with a varying quantity given according to priority, by consent of all parties in the suit, 700 miners' inches of water is to be given the Indians, for use upon these lands at all stages in the river, and prior to the distribution and diversion of the remaining water in the river, such water to be measured at the lateral ditch or ditches to such land at their point of diversion from the Arizona canal. Certain other parcels of land in this reservation not embraced in the area above mentioned, have also been put in cultivation from time to time by these Indians, but these parcels are not included in the area for which the 700 inches are appropriated, but form a part of the land in class B entitled only to the right to obtain water appertaining to the land in that class, and are found in the tabulated statement of such land.

For many years last past a number of Indians living on land within the Camp McDowell Indian Reservation, situated along the Verde river above its conflux with Salt river, have cultivated such land by means of water diverted from the Verde River.

* * * *

[See Plate No. 1 for General Location Map, at page 27a, *supra.*]

APPENDIX I

[SEAL]

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
Washington, D.C. 20240

May 19, 1982

Ronnie Lupe, Chairman
White Mountain Apache Tribe
P.O. Box 1150
Whiteriver, Arizona 85941

Dear Mr. Lupe:

Secretary Watt has asked me to respond to your letter of April 14, 1982, concerning our preparation of reserved water rights claims on behalf of the White Mountain Apache Tribe for the pending adjudication of the Salt River watershed. (No. W-1 Maricopa County Superior Court). The claims were due to be filed this spring, but recent decisions by the Court of Appeals for the Ninth Circuit have raised the question whether Arizona courts have jurisdiction to adjudicate Indian reserved water rights. *San Carlos Apache Tribe v. Arizona*, 668 F.2d 1093 (9th Cir. 1982); *Northern Cheyenne Tribe v. Adsit*, 668 F.2d 1080 (9th Cir. 1982); *Navajo Nation v. Arizona*, 668 F.2d 1100 (9th Cir. 1982).

On March 1, 1982, Judge Goodfarb ordered a stay of proceedings in the adjudication until the United States Supreme Court makes a final decision on the Ninth Circuit decisions. The immediate effect of this ruling is to postpone any filings by the United States on behalf of the White Mountain Apache Tribe's reserved rights in the Salt River watershed.

While, we fully expect the decisions of the Ninth Circuit in the *Northern Cheyenne*, *San Carlos* and *Navajo* decisions to be reviewed in the Supreme Court, we cannot predict the outcome. In any event, adjudication of the Salt River may well occur in federal court if not in state court in the absence of a negotiated settlement. Our opinion is based on the understanding that there is such intense demand for water in central Arizona that the principal surface water supply cannot continue unadjudicated much longer. Insuring that the White Mountain Apache Tribe is thoroughly prepared to confront the prospect of adjudication is of concern to us. As you know, the Bureau of Indian Affairs has provided the tribe with funds to assist in identifying water resources on the reservation and their development potential. (Contract No. H50C14201279). Associate Solicitor Jensen, in his letter of January 29, 1982, to your attorney William Veeder (Appendix F to your letter), refers to that contract and other work in this Department related to claims preparation. Your criticism of our claims preparation for the stream adjudication (No. W-1) now pending in Maricopa County Superior Court is based on the work of tribal consultants which we have not been given the opportunity to review. We would appreciate your furnishing us with an opportunity to do so. Such an opportunity could resolve some of the discrepancies between the claims we have prepared and your conclusions.

However, based on the information you have provided to us thus far, we cannot agree that the claim prepared by the United States for the White Mountain Apache Tribe is "false or grossly incorrect" as you suggest. Nor can we agree to your request that government employees who prepared the claims testify under oath about their work before the tribal council. We are prepared, however, to meet with you and the council to explain the claims we have prepared as we have done with other tribes.

Finally, and as we requested in Associate Solicitor Jensen's January 29, 1982, letter to Mr. Veeder, we would appreciate your completed work on contract No. H50C14201279 and an opportunity to review the work of your consultants regarding the tribe's reserved water rights.

Sincerely,

/s/ Jean Kingrey
for Solicitor

Office - Supreme Court, U.S.
FILED
SEP 24 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-2334

In the Supreme Court of the United States

OCTOBER TERM, 1982

THE WHITE MOUNTAIN APACHE TRIBE, PETITIONER

v.

WILLIAM FRENCH SMITH, ATTORNEY GENERAL OF THE UNITED STATES, AND JAMES G. WATT, SECRETARY OF THE INTERIOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

REX E. LEE
Solicitor General

CAROL E. DINKINS
Assistant Attorney General

EDWARD J. SHAWAKER
MARTIN W. MATZEN
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the court of appeals correctly affirmed the dismissal of the suit filed by petitioner White Mountain Apache Tribe seeking to prevent the Attorney General of the United States from appearing in a water adjudication pending in state court in Arizona to present claims for water rights held by the United States in trust for the Tribe.

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The order of the district court (Pet. App. 6a) and the memorandum opinion of the court of appeals (Pet. App. 2a-3a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 16, 1982 (Pet. App. 1a), and a petition for rehearing was denied on April 8, 1982. The petition for a writ of certiorari was filed on June 22, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Since 1979, an action seeking an adjudication of rights to water from the Salt River in Arizona has been pending in the Superior Court for Maricopa County, Arizona (Pet.

App. 2a n.1). In that year, petitioner and other Indian tribes claiming rights to the use of Salt River water removed the state water proceeding to the United States District Court for the District of Arizona and there sought to have it dismissed on the ground that the State did not have jurisdiction over Indian water rights. The federal district court held that the state court did have jurisdiction and remanded the proceeding to state court. The district court also dismissed several actions filed by other Indian tribes seeking declaratory and injunctive relief against further state proceedings and, in the case of one tribe, an adjudication of its rights to Salt River water.

The United States Court of Appeals for the Ninth Circuit subsequently reversed the district court's dismissal of the suits filed by the other tribes and remanded them for a determination of whether the State of Arizona had overcome barriers to the assumption of jurisdiction over Indian water rights that the court of appeals found in the disclaimer provisions of the Arizona Enabling Act and the state constitution. *San Carlos Apache Tribe* v. *Arizona*, 668 F. 2d 1093 (9th Cir. 1982); see also *Navajo Nation* v. *United States*, 668 F. 2d 1100 (9th Cir. 1982). The State of Arizona has petitioned for a writ of certiorari to review the Ninth Circuit's decision in those cases. No. 81-2147. The United States has urged the Court to grant that petition, as well as the petition filed in a companion case, *Montana* v. *Northern Cheyenne Tribe*, No. 81-2188, to resolve a circuit conflict on the disclaimer clause issue and to clarify the law governing the relationship between federal and state water adjudications involving Indian rights.[1]

---

[1]The background of the Arizona water adjudication generally is described in the Memorandum for the United States in Nos. 81-2147 and 81-2188 at 3-4, 24. We have furnished petitioner with a copy of that Memorandum.

2.a. After the federal district court in Arizona remanded the water adjudication to state court, petitioner brought this action in the United States District Court for the District of Columbia on May 24, 1981, to prevent any submissions by the United States in the state proceeding with respect to the water rights held by the United States in trust for petitioner (Pet. App. 62a-63a). Petitioner contended that the state water adjudication was of insufficient geographic scope to constitute a general adjudication to which the United States' sovereign immunity had been waived by the McCarran Amendment, 43 U.S.C. 666 (Pet. App. 29a-30a, 54a-55a), and that the Attorney General, assisted by the Secretary of the Interior, would inadequately represent the Tribe's interest in its water rights, in view of the potential presentation by the United States of other federal water right claims in the same proceeding (Pet. App. 32a, 40a-41a, 61a).

b. By order entered on June 23, 1981, the district court dismissed the complaint, holding that it did not have jurisdiction over the Attorney General's exercise of his litigating judgment (Pet. App. 6a). On March 15, 1982, the United States Court of Appeals for the District of Columbia Circuit affirmed the district court's dismissal of the complaint (Pet. App. 1a-3a). The court noted in its unpublished memorandum that although petitioner had alleged that the Secretary of the Interior had violated his trust responsibilities to the Tribe, the specific action complained of was the Attorney General's decision to participate in the Arizona litigation. The court of appeals' affirmance was expressly limited to this narrow issue, and it "intimate[d] no views about federal jurisdiction * * * over a suit by this or any other tribe, challenging other actions by the Secretary of the Interior with respect to the exercise of his trust responsibilities" (*id.* at 3a). The court also refrained from expressing any view on the merits of the litigation pending in state and federal court in Arizona (*ibid.*).

c. Prior to the court of appeals' decision in this case, the United States, on January 4, 1982, filed in state court claims to the use of Salt River water for certain federal uses. On January 29, 1982, the United States filed a motion in state court to dismiss the water adjudication. On March 24, 1982, the state court issued an order holding the United States' motion to dismiss in abeyance pending a final decision by this Court on review of the Ninth Circuit's decisions in *San Carlos Apache Tribe* v. *Arizona, supra*, and *Navajo Nation* v. *Arizona, supra*, petition for certiorari pending, No. 81-2147. Under that March 24, 1982 order, the United States is not required to file any statement of water right claims for the benefit of the Tribe until whatever action this Court takes in No. 81-2147 is final.

ARGUMENT

1. Especially given the current status of the adjudication of Indian water rights in Arizona, the dismissal of petitioner's action seeking to prevent the Attorney General from filing with the state court a claim of a right to Salt River water held in trust for petitioner plainly does not warrant review. If this Court grants certiorari in No. 81-2147 and holds that Arizona courts are without jurisdiction over Indian water rights or that such rights should be adjudicated in federal court if that forum is timely invoked,[2] the state court presumably will dismiss the water adjudication insofar as the rights held in trust for petitioner are concerned. The same result may well obtain if this Court denies certiorari in No. 81-2147, thereby leaving the Ninth Circuit's ruling on the disclaimer clause issue standing. In either event, this separate action to prevent the Attorney General from filing claims in state court would have been rendered moot.

---

[2]See Memorandum for the United States in Nos. 81-2147 and 81-2188, at 17-24.

On the other hand, if this Court grants certiorari in No. 81-2147 and holds that Arizona courts are not barred by the disclaimer clauses or principles of sound judicial administration from assuming jurisdiction under the McCarran Amendment to adjudicate rights held in trust for Indians, the state court proceeding then would resume. The state court presumably then would rule on the government's pending motion to dismiss. If the state court were to grant that motion, the instant suit seeking to prevent the Attorney General from presenting the water right claim for the benefit of petitioner likewise would have been rendered moot.

Only if the state court were to deny the government's motion to dismiss after this Court takes final action on the petition in No. 81-2147 would the Attorney General then be in the position where he would have to take the action that petitioner has sought in this suit to prevent. It is, of course, uncertain that this eventuality will come to pass. But if it does, petitioner would have nothing to gain, and everything to lose, by an injunction barring the Attorney General from filing a claim to use of water for petitioner's benefit, because the state court made clear that if such a claim is not filed the water right for the benefit of the Tribe would be lost (see Pet. App. 31a n.1; see Ariz. Rev. Stat. Ann § 45-254(E) (Cumm. Supp. 1981)).

Petitioner apparently is concerned (Pet. 13-16) that the water right claims filed by the Attorney General on behalf of the United States for other federal purposes might have an effect on the amount of water claimed for the benefit of petitioner. But we do not appreciate what would be gained by the instant suit seeking to prevent the Attorney General from claiming *any* water for the Tribe's benefit; such a default could have the effect of forfeiting the water rights held for the Tribe's benefit if the state court has jurisdiction

to adjudicate those rights. In any event, if petitioner is dissatisfied at a later date with the amount of water claimed by the United States for its benefit or the Attorney General's presentation of that claim, petitioner would have a fully adequate remedy by intervening in the state court proceeding to protect its interests. Cf. *Trbovich* v. *United Mine Workers*, 404 U.S. 528 (1972).

In sum, there are no considerations warranting review at this time of the Tribe's efforts to prevent the Attorney General from asserting a water right held by the United States in trust for the Tribe. Moreover, we have urged the Court to grant certiorari in Nos. 81-2147 and 81-2188 to resolve issues concerning the relationship of the state and federal courts in the adjudication of Indian water rights. Those issues are not presented here. The Court's resolution of the questions raised in Nos. 81-2147 and 81-2188 should not, we submit, be further complicated by interjection of tangential procedural questions concerning the power of a court to enjoin the Attorney General in the exercise of his litigating responsibilities.

2. Against the foregoing background, we offer only a few observations on the merits of the dismissal of petitioner's suit, for it would be extraordinary in any event if this Court were to hold that a court could enter an injunction or otherwise review the litigating judgment of the Attorney General to file or defend a lawsuit on behalf of the United States or, as here, to advance a particular claim in that lawsuit. If a claim is advanced by the Attorney General on behalf of the United States as a party to litigation, the court, state or federal, having jurisdiction of the matter may rule on the merits of that claim in the course of deciding the particular case before it. It would be quite a different matter, however, for a court to prevent the Attorney General from even presenting the claim for judicial resolution, as petitioner urges here.

The Attorney General's responsibilities with respect to the adjudication of water rights in Arizona are quite clear. In the McCarran Amendment, 43 U.S.C. 666, Congress gave consent "to join the United States as a defendant in any suit" in state or federal court for the adjudication or administration of rights to the use of water of a river system where it appears that the United States is the owner of such rights. Under 28 U.S.C. 516 and 519, the conduct of such litigation to which the United States is a party is explicitly reserved to the control of the Attorney General.

In enacting the McCarran Amendment, Congress obviously intended that the Attorney General would in fact assert in any suit in which the United States is properly joined all water rights owned by the United States. Under Article IV, Section 3 of the Constitution, Congress has the "Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." The McCarran Amendment is one such "Rule" respecting the property of the United States, and the Attorney General, as the President's agent in fulfilling the Executive responsibility to "take Care that the Laws be faithfully executed" (Article II, Section 3), has a duty to carry out the congressional purpose by asserting the rights owned by the United States in a suit authorized by the McCarran Amendment. By the same token, the Attorney General is not authorized effectively to dispose of those rights by failing to assert them in a water adjudication, because under the Constitution, it is Congress, not the Executive, that is vested with responsibility to dispose of property owned by the United States.

Moreover, in *Colorado River Water Conservation District* v. *United States*, 424 U.S. 800, 809-813 (1976), this Court held that the consent to suit in the McCarran Amendment applies equally to water rights held by the

United States in trust for an Indian tribe. Accordingly, where the United States is joined as a party in state court proceedings authorized by the McCarran Amendment, the Attorney General must ensure that water rights owned by the United States for the benefit of an Indian tribe are asserted along with other rights to which the United States has title. To fail to assert the Indian rights would constitute a breach of the trust responsibility of the United States to the Indians with respect to such rights. Indeed this Court stressed in *Colorado River Water Conservation District, supra*, that the Federal Government, in consenting to suit in state court, "has not abdicated any responsibility fully to defend Indian rights in state court" (424 U.S. at 812).

In view of the Attorney General's explicit responsibilities, described above, there plainly is no basis for petitioner to obtain declaratory or injunctive relief to prevent the Attorney General from filing a claim in the Arizona state water adjudication for water rights held by the United States in trust for petitioner. This conclusion is not altered by the fact that the Attorney General also will assert water rights for other federal purposes as well. Congress has assigned to the Attorney General the responsibility for advancing *all* of the claims of the United States, including Indian claims, in suits authorized by the McCarran Amendment, and the courts must respect this congressional judgment.

If petitioner believes that the Attorney General's presentation of water rights held in trust for its benefit will be inadequate, because of what it characterizes as a conflict of interest resulting from the existence of other federal water rights or for any other reason, petitioner can fully protect its interests by intervening in the state proceeding through independent counsel of its choice. It then would be as free as any other litigant to challenge the factual and legal positions taken by the Attorney General on behalf of the

United States. But petitioner may not, in our view, invoke the jurisdiction of the United States District Court for the District of Columbia to supervise and direct the performance of the Attorney General and his agents in conducting the litigation in state court in Arizona.

Contrary to petitioner's apparent contention (Pet. 17-30), the Administrative Procedure Act (APA) does not authorize review of the Attorney General's litigating strategy. There is a substantial question whether the assertion of a claim by the Attorney General in court even constitutes the kind of "agency action" to which the judicial review provisions of the APA apply. See 5 U.S.C. 551(13), 702, 704 and 706. Even if it does, however, the assertion of a water right claim for the benefit of petitioner would not be subject to judicial review under the APA because petitioner has an "adequate remedy in a court" (5 U.S.C. 704) through intervention in the water adjudication itself and the presentation of its own legal position therein. Finally, the conduct of litigation assigned to the Attorney General traditionally has been regarded as being committed to his discretion (see, *e.g.*, *Swift & Co.* v. *United States*, 276 U.S. 311, 331-332 (1928); *Ponzi* v. *Fessenden*, 258 U.S. 254, 262 (1922); *United States* v. *San Jacinto Tin Co.*, 125 U.S. 273, 279 (1888)); *Confiscation Cases*, 74 U.S. (7 Wall.) 454 (1868), and, therefore, is not subject to judicial review under the APA for this additional reason as well (5 U.S.C. 701(a))—at least in the context of this case, where the Attorney General in fact would advance a claim for the Tribe's benefit if the state court adjudication resumes in the future. Cf. *Dunlop* v. *Bachowski*, 421 U.S. 560, 571-573 (1975).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

CAROL E. DINKINS
Assistant Attorney General

EDWARD J. SHAWAKER
MARTIN W. MATZEN
Attorneys

SEPTEMBER 1982

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No. 81-2334

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

THE WHITE MOUNTAIN APACHE TRIBE, a body corporate established pursuant to § 16 of the Act of June 18, 1934 (48 Stat. 987; 25 U.S.C. 476) and duly recognized by the Secretary of the Interior,

Petitioner,

v.

WILLIAM FRENCH SMITH,
Attorney General of the United States of America,

and

JAMES G. WATT, Secretary of the
United States Department of the Interior,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY TO BRIEF FOR THE RESPONDENTS IN OPPOSITION

WILLIAM H. VEEDER
Suite 920
818 18th Street, N.W.
Washington, D.C. 20006
(202) 466-3890
Attorney for
White Mountain Apache Tribe
Petitioner

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY TO BRIEF FOR THE RESPONDENTS IN OPPOSITION

ABSOLUTE IMMUNITY MUST NOT BE PERMITTED TO CLOAK ILLEGAL, ARBITRARY AND CAPRICIOUS ACTS OF ATTORNEY GENERAL AND SECRETARY OF INTERIOR AS TO BOTH LITIGATING AND NON-LITIGATING CONDUCT

A. Bad Faith Is The Hallmark Of Attorney General's Brief In Opposition

There is a shocking impropriety in the Attorney General's attempt to shield bad faith conduct by him and by the Secretary of Interior behind a facade of absolute

immunity. Clear beyond question is the fact that Petitioner White Mountain Apache Tribe, with far better knowledge than the Attorney General of both the facts and law, has rejected as unwanted and highly suspect any representation by the Attorney General and his staff in the contentious Arizona state court water litigation. The Assistant Attorney General, who joined in seeking to prevent the Tribe from having its day in court, is actively attempting to denigrate and diminish the monetary value of the Tribe's invaluable Salt River rights in the Court of Claims, Case No. 22-H.[1] Here, the Tribe is not only seeking to fend off the Assistant Attorney General's attacks in the Court of Claims, it is seeking at all costs to prevent the Attorney General and the Secretary of Interior from subverting the Tribe's Salt River rights to the state court for the benefit of the Secretary's Salt River Federal Reclamation Project and the now abuilding Central Arizona Federal Reclamation Project.

Unable to respond to the Tribe's charges respecting the flagrantly false Salt River claims prepared by the Attorney General and the Secretary of Interior, the Assistant Attorney General seeks here to avoid judicial exposure of bad faith conduct by invoking absolute immunity.[2]

B. Admission Of Charges By Petitioner Tribe Against Attorney General And Secretary Of Interior

In Petitioner Tribe's verified Complaint, summarily dismissed by the District Court, it is separately charged

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[1] See, p. 5, *infra*, "Issues Here Transcend. . . ."

[2] See, Appendix A to this Reply. See, Appendix B to this Reply. It will be observed there that the Assistant Attorney General represents, in gross error, that the Department of Interior had "responded substantively" to the Tribe's charges that the Assistant Attorney General and the Secretary of Interior had joined to falsely represent the Tribe's Salt River rights in the claim prepared by the Department of Justice. As can be seen from the Interior Department's May 19, 1982 letter (Pet. App. I, at p. 154a), the statement of the Assistant Attorney General is untrue.

that there is illegal, arbitrary and capricious conduct not only as to the litigating judgment of the Attorney General, but likewise as to the non-litigating conduct of both the Attorney General and the Secretary of Interior.[3]

The Department of Justice moved to dismiss *only* as to the Attorney General and then *only* as to the Attorney General's misconduct involving litigating judgment. By the Motion to Dismiss,[4] the Attorney General admitted not only the misconduct charges directed against that officer by the Tribe as to litigating judgment, but likewise to all aspects of non-litigating misconduct by both the Attorney General and the Secretary of Interior.[5]

Assuming arguendo only that the Attorney General, the District Court and the Court of Appeals could ignore the Tribe's verified Complaint as filed and contrive issues, as they did, the principles of absolute immunity do not include charges of illegal, arbitrary and capricious conduct on the part of the Attorney General, which the Tribe is prepared to prove.[6]

C. It Is Error To State The Issues Here Could Be Rendered Moot

There is a single issue here: Is the Attorney General empowered to force rejected and unwanted representation upon the Tribe in western water litigation when that officer is, as here, immersed in irreconcilable conflicts of Interest? In the Ninth Circuit's *Northern Cheyenne* and *San Carlos* decisions, it is understated that the Attorney General's representation is inadequate where, as here, that officer is encompassed with conflicts of interest.[7] The conflict of interest issue is *not* raised in the pending

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[3] See, Pet., at pp. 4, *et seq.*

[4] See, Pet. App. G, at p. 18a.

[5] See, Pet., at p. 4, paras. A, *et seq.*

[6] *Ibid.*, at pp. 4, 22 & 23.

[7] *Ibid.*, at pp. 15, *et seq.*

petitions for certiorari in the *Northern Cheyenne* and *San Carlos* cases. As stressed in the Tribe's Petition, the *Northern Cheyenne* and *San Carlos* decisions are diametrically opposed to the plain and serious errors contained in the opinion of the Court of Appeals for the District of Columbia Circuit.[8]

D. "Fraud" And The "Badges Of Fraud" [9]

For three-quarters of a century, the Attorney General and the Secretary of Interior have connived to take from Petitioner Tribe its Salt River rights for the benefit of the Salt River Federal Reclamation Project. If successful in denying the Tribe its day in court by the summary dismissal of the Tribe's verified Complaint, those officials will have succeeded in their confiscatory efforts.

There is no merit to the contention by the Justice Department in its Brief in Opposition that the Tribe could protect itself in the state court.[10] These are the facts respecting the state court into which the Attorney General and the Secretary of Interior seek to force Petitioner Tribe. Early on—in 1910—the Attorney General appeared in that state court and procured the entry of the *Kent Decree*. By the *Kent Decree*, the Indian tribes, who were unfortunate enough to be represented by the Attorney General, were stripped of their reserved rights by the Attorney General. An appearance by the Tribe in that state court would unquestionably result in the Tribe likewise being stripped of its reserved rights for the benefit of the Secretary's Salt River Federal Reclamation Project and the now abuilding Central Arizona Federal Reclamation Project. That is the end product which the Department of Justice seeks to shrug off in its Brief in Opposition.

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[8] *Ibid.*, at pp. 9, *et seq.*; see, Pet. App. A, *et seq.*

[9] Pet. App. H, at p. 42a.

[10] Brief in Opposition, at pp. 8-9.

Only the foolish or the corrupt would voluntarily take Petitioner Tribe's Salt River rights into the state court where both the Secretary of Interior and the Attorney General seek to subvert the Tribe and its rights. The Tribe is prepared to prove these facts. The summary dismissal, in effect, cloaks corrupt conduct.

E. Issues Here Transcend Attorney General's Misconduct—State Jurisdiction

The anxiety displayed by the Attorney General and the cover-up, which evoked the claim of absolute immunity against the Tribe's action, is understandable on this background:

1. There is pending before the Court of Claims Case No. 22-H. That proceeding was initiated by Petitioner White Mountain Apache Tribe to recover damages for mismanagement by the Attorney General and the Secretary of Interior—but not for the taking—of the Tribe's natural resources, including its Salt River rights.

2. In regard to the Arizona state court water rights proceeding, the Assistant Attorney General prepared a flagrantly false "Water Rights Claim Of The United States As Trustee For The White Mountain Apache Tribe." In explicit terms, in a letter dated April 14, 1982, Ronnie Lupe, Chairman of Petitioner Tribe, challenged the "Water Rights Claim" demanding that the Attorney General retract statements made in the claim.[11] Alternatively, the Attorney General was requested to send personnel to the Tribal Council to justify the manifest errors in the "Water Rights Claim." Last month, August 18, 1982, the Attorney General, through the Assistant Attorney General, belatedly and in error, attempted to respond

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[11] See, Appendix A to this Reply, letter dated April 14, 1982, from Ronnie Lupe, Chairman of Petitioner White Mountain Apache Tribe, to Respondent William French Smith, Attorney General.

to the Tribe's April 14, 1982 demands.[12] Among other things, it is there stated, in error, that the Secretary of Interior had "responded substantively" to the Tribe's charges against the Attorney General. That statement is untrue, as can readily be discerned from the letter from the Department of Interior to Chairman Lupe.[13]

3. By preparing the "Water Rights Claim" in the Salt River in a manner that is flagrantly in error, the Assistant Attorney General not only undertook to denigrate Petitioner Tribe's rights as they pertain to the on-going Salt River litigation, but likewise gravely undercut the Tribe's rights in the Court of Claims Case No. 22-H.

By a single stroke, the Assistant Attorney General seeks to diminish the Tribe's Salt River rights in the state court for the benefit of the federal reclamation projects and simultaneously seeks to reduce the claim against which that officer is defending in the Court of Claims.

The posture of the Assistant Attorney General under the circumstances is grossly immoral.

Normally, this Court would disbar an attorney appearing before it immersed in conflicts of interest of the character which pervade all of the conduct of the Assistant Attorney General respecting the Tribe's invaluable Salt River rights. Most assuredly, the concept of absolute immunity does not prohibit judicial review under the undeniable facts set forth above.[14]

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[12] See, Appendix B to this Reply, letter dated August 18, 1982, to Ronnie Lupe, Chairman, from Carol E. Dinkins, Assistant Attorney General.

[13] See, Pet. App. I, at p. 154a.

[14] Pet., at pp. 15, *et seq.*

MEMORANDUM FOR THE UNITED STATES DEMONSTRATES NEED TO GRANT TRIBE'S PETITION [15]

Reference is made to the Brief in Opposition to the Memorandum for the United States in the *San Carlos* and *Northern Cheyenne* decisions of the Court of Appeals.[16] Reference is likewise made to the Petition of the White Mountain Apache Tribe in the Memorandum last mentioned.[17]

Underscored by the Memorandum for the United States is the impropriety of permitting the Attorney General to represent the tribes in western water litigation. Conflicts of interest and political expediencies govern the course of conduct by the Attorney General, the Assistant Attorney General and their respective staffs. As stressed here, the Assistant Attorney General greatly benefits by denigrating Petitioner Tribe's Salt River rights.[18]

The attack by the Attorney General and the Assistant Attorney General upon the disposition made by the Court of Appeals for the Ninth Circuit in *San Carlos* and *Northern Cheyenne* respecting "The Disclaimer Issue" [19] is similarly self-serving.

A fair-minded disposition of the disclaimer issue could have been predicated upon this correct statement:

> . . . the disclaimer provisions appear to be an express confirmation of the general rule, not the fashioning

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[15] See, Nos. 81-2147 & 81-2188, Arizona v. San Carlos Apache Tribe; Montana v. Northern Cheyenne Tribe, "Memorandum for the United States."

[16] *Ibid.*, at p. 2, note 1.

[17] *Ibid.*, at p. 3, note 2.

[18] See, pp. 5 & 6, *supra*.

[19] See, Nos. 81-2147 & 81-2188, Arizona v. San Carlos Apache Tribe; Montana v. Northern Cheyenne Tribes, "Memorandum for the United States," at p. 9.

> of a new principle. . . . indeed, the Court itself, both before and after the first disclaimer clauses were written in 1889, made clear that absence of an express disclaimer did not oust federal jurisdiction or subject Indian land to State authority.[20]

Rather than stating that the Ninth Circuit's disposition of the disclaimer issue was proper and should be applied to the non-disclaimer states, the Attorney General, as would be expected, aligned himself against the Court of Appeals for the Ninth Circuit and against the western Indians.

It is correct to say that the Department of Justice induced the *Eagle River* decision [21] by seeking a writ of prohibition from the Supreme Court of the State of Colorado against the District Court, in which the *Eagle River* litigation arose.

In *Eagle River*, over strenuous objections, the Attorney General represented to this Court that Indian reserved rights are the same as federal reserved rights. From that course of conduct, grave damages have continued to flow to the tribes.

It is not an overstatement to suggest that the *Eagle River* decision was a preface to disaster for western Indians.[22] There was shortly to follow the *Akin* decision.[23]

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[20] *Ibid.*, at p. 14.

[21] United States v. District Court of Eagle County, 401 U.S. 520 (1971).

[22] United States, Petitioner v. District Court in and for the County of Eagle and State of Colorado, *et al.*, October Term 1971, No. 87, "Motion of Fort Mojave Tribe of Indians for Leave to File Suggestion of Interest and Points and Authorities in Support. . . ." at pp. XVI, *et seq.*

[23] Colorado River Conservation District v. United States (Akin), 424 U.S. 800 (1976).

In keeping with the policies espoused by the Attorney General against the Indians, while professing to be their advocate, the conduct of that official can be categorized as another shameful demonstration "of a gross national hypocrisy." [24]

Chief Justice Marshall recognized the obvious in *Worcester*, when he afforded the tribes protection against the state, the mortal enemy of the Indian people.[25] Times have not changed.

CONCLUSION

The White Mountain Apache Tribe requests that its Petition for Certiorari be granted to the end that the desire of the Attorney General greatly to broaden the concepts of absolute immunity from suit may be defeated and that the Tribe be granted its day in court.

WILLIAM H. VEEDER
Suite 920
818 18th Street, N.W.
Washington, D.C. 20006
(202) 466-3890
Attorney for
White Mountain Apache Tribe
Petitioner

September 1982

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[24] United States v. Ahtanum Irrigation District . . . and the State of Washington, *et al.*, 236 F.2d 321, 338 (1956).

[25] Worcester v. Georgia, 31 U.S. 515 (1831).

APPENDIX A

Executive Office of the Chairman

WHITE MOUNTAIN APACHE TRIBE

April 14, 1982

The Honorable William French Smith
Attorney General of the
United States of America
Department of Justice
10th & Pennsylvania, N.W.
Washington, D.C. 20530

Dear Mr. Attorney General:

In the pending case of *United States v. White Mountain Apache Tribe* in the United States District Court for the District of Arizona, Civil No. 81-1606-PCT-VAC, the Tribe has challenged the power and authority of the Attorney General to force its representation upon the Tribe respecting its invaluable Salt River rights in the Arizona state water rights proceeding, No. W-1. Responding to that challenge, you assert, and at this juncture the courts have agreed, that your "litigating judgment" is beyond judicial review. The Tribe disagrees and will continue to challenge your contentions until there is a final determination on the subject in a court of last resort.

Presently, the case of *United States v. White Mountain Apache Tribe* is in abeyance awaiting a final disposition of recent decisions by the United States Court of Appeals for the Ninth Circuit declaring that the state court lacks jurisdiction over the White Mountain Apache Tribe and the Tribe's Salt River rights. Quite aside from the pending litigation and requiring determination at this time is your responsibility owing to the Tribe as principal agent of the United States, trustee.

Through your subordinates, there was prepared for filing in the above-mentioned No. W-1 proceeding a flagrantly false "Water Rights Claim Of The United States As Trustee For The White Mountain Apache Tribe." That claim, let me stress, was either formulated or approved by both Mr. Steven Carroll of the Department of Justice and Mr. Michael Johns, Assistant United States Attorney, Phoenix, Arizona. Those subordinate officials were fully advised that the data relied upon in the formulation of the water rights claim were grossly inadequate and totally in error. Those subordinates, nevertheless, participated in the preparation and approval of the water rights claim, which would have been filed in the state court on January 14, 1982, had not the court, in *United States v. White Mountain Apache Tribe*, restrained those officials from filing.

I am transmitting to you a copy of the March 9, 1982, Tribal Resolution and the accompanying legal and factual analysis, asserting, among other things, that there must be a complete retraction of the water rights claim and a rejection of the data relied upon in formulating the claim. The retraction of the water rights claim and the rejection of the data relied upon must be in writing to the end that the Tribe can be protected against any use of the claim or the data by claimants who are vigorous adversaries of the rights asserted by the Tribe in the Salt River.

Alternatively, if you do not desire to retract the water rights claim and reject the data upon which it was formulated, the Tribe requests that you direct Mr. Carroll and Mr. Johns of your staff to appear before the Tribal Council and to undertake, under oath, to justify their actions in formulating and accepting the water rights claim and utilizing the data upon which it was prepared.

In the accompanying memorandum prepared by Special Council for the Tribe, there is chronicled in great detail the extent and nature of the highly objectionable aspects

of the water rights claim and the data that was used in the formulation of it.

I would appreciate hearing from you at an early date to the end that both the claim and the data giving rise to it no longer continue to be threats to the Tribe and to the Tribe's invaluable Salt River rights.

Sincerely,

/s/ Ronnie Lupe
RONNIE LUPE
Tribal Chairman
White Mountain Apache Tribe

RL:bb

[SEAL]

APPENDIX B

U.S. DEPARTMENT OF JUSTICE

LAND AND NATURAL RESOURCES DIVISION

Office of the Assistant Attorney General

Washington, D.C. 20530

18 Aug., 1982

Ronnie Lupe, Chairman
White Mountain Apache Tribe
Post Office Box 1150
White River, Arizona 85941

Dear Mr. Lupe:

Your letter of April 14, 1982 to the Attorney General concerning the preparation of reserved water rights claims on behalf of the White Mountain Apache Tribe for filing in the Arizona state court proceeding (No. W-1 Maricopa County Superior Court) has been forwarded to me for response.

As we said to you in our letter of March 26, 1982, and reiterate here, this matter is in litigation between the United States and your Tribe and will be affected by other litigation concerning the State's jurisdiction in No. W-1 which may terminate the state proceeding. Our views as to the appropriate federal role have been expressed in our court filings as well as in previous letters to you from Department of Justice officials. Because the issue is still in litigation, where the Tribe is represented by counsel, further comment here would be inappropriate. We also note in this regard that the Department of the Interior in its May 19, 1982 reply to your letter of April

14, 1982, responded substantively and at some length to your criticisms of the United States' preparation of the claim for the No. W-1 stream adjudication.

Finally, we join the Department of the Interior and urge once again the request, made in our March 26 letter, that you work with the United States in preparation of the claim involving the Tribe's *Winters* rights. As stated in the March letter, if and when the filing of such a claim becomes necessary, we hope it can be prepared and filed with the Tribe's cooperation. In this connection, we emphasize Interior's request that you share with them the completed work on Contract No. H50C14201279 and provide them an opportunity to review the work of your consultants on the Tribe's reserved water rights.

Sincerely,

CAROL E. DINKINS
Assistant Attorney General

cc:

William H. Veeder, Esquire
818—18th Street N.W.
Suite 920
Washington, D.C. 20006